PREME COURT, U.S.

No. 580

No. 5227.

FILED
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JOHN T. FEY, Cle

United States Court of Appeals

For the First Circuit

LIZZA AND SONS, INC.,

DEFENDANT, APPELLANT,

v.

HARTFORD ACCIDENT & INDEMNITY COMPANY, ET AL.,

APPELLEES.

RECORD APPENDIX

TO

BRIEF FOR THE APPELLANT

Blanchard Printing Company, Boston, Mass.—Law Printers

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 56-179-A

HARTFORD ACCIDENT & INDEMNITY COMPANY

v.

DANIEL A. D'ONFRO
RALPH D. D'ONFRO
EMANUEL D. D'ONFRO
VIRGIL D. D'ONFRO
NICHOLAS A. D'ONFRO, copartners, dba
Daniel D'Onfro's Sons, and
LIZZA & SONS, INC.

DOCKET ENTRIES.

1956

Mar. 1 Complaint filed. Summons issued.

12 Marshal's return of sum's, with service Mar. 5 on all individual defts.; Mar. 6 on deft. Lizza & Sons. (Commr. of Corps.), filed.

20 Defts' answer filed.

27 Answer of deft. Lizza & Sons, Inc., filed.

Apr. 28 Defendant, Lizza & Sons, Inc., motion for judgment on pleadings filed.

May 23 Brief of deft. Lizza & Sons, Inc., motion for judgment on pleadings, filed.

29 ALDRICH, J. Hearing on motion for judgment on the pleadings; motion denied without prejudice.

June 2 Deft's, Lizza & Sons, motion for trial by jury, filed.

5 Defts', Daniel D'Onfro's Sons, motion for trial without jury, filed.

12 Plf's opposition to motion of defendant LIZZA for trial by jury, filed.

1956

Aug. 21 ALDRICH, J. On Defts' Motion for trial with jury: on plf's motion for trial without jury; Nov. 12, 1956 trial list.

Dec. 11 ALDRICH, J. Motion to amend complaint presented; trial without jury begins; evidence.

12 ALDRICH, J. Motion to amend complaint allowed; trial without jury continues; evidence.

13 ALDRICH, J. Trial without jury continues; (letter marked Ex. AA from Doctor showing why Daniel D'Onfro could not be present); briefs no later than Dec. 26; oral arguments.

26 Brief on behalf of defendants, Daniel A. D'Onfro et al, dba, filed.

1957

Jan. 2 ALDRICH, J. OPINION filed: A judgment of complainant's non-liability will be entered. Copies to Messrs. Corcoran, Solomon, Capeless, mailed.

2 ALDRICH, J. FINAL JUDGMENT entered: "Upon the opinion of even date it is hereby adjudged as follows:

1. The respondents Lizza & Sons, Inc. and D'Onfro's Sons, did not, at any time prior to the delivery to Lizza of complainant Hartford Accident & Indemnity Company's bond dated July 26, 1955, enter into any contract or agreement with each other and complainant is under no liability to either respondent on account of said bond.
2. Complainant shall have its costs against respondent LIZZA & SONS, INC. taxed in the amount of $. Copies mailed to Messrs. Corcoran, Solomon, and Capeless.

28 Notice of appeal filed by defendants Lizza & Sons, Inc. Copy of n/a mailed to Ely, King,

1957

Kingsley & Corcoran, Hugh J. Corcoran, Esq. 1387 Main St., Springfield, Mass.

28 $250.00 deposited in lieu of surety on an appeal bond.

Feb. 14 Stenographic records (3 vols. & one excerpt) filed December 11, 12, & 13, 1956.

19 Original papers for record on appeal delivered to the U. S. Court of Appeals.

Mar. 4 Motion for Extension to Docket Record on Appeal filed.

4 ALDRICH, J. Motion for Extension to Docket Record on Appeal denied. Counsel notified.

COMPLAINT FOR DECLARATORY RELIEF.

Plaintiff for its complaint herein, by Hugh J. Corcoran, its attorney, alleges:

1. Plaintiff is a corporation organized and existing under the laws of the State of Connecticut. The defendants, Daniel A. D'Onfro, Ralph D. D'Onfro, Emanuel D. D'Onfro and Nicholas A. D'Onfro and Virgil S. D'Onfro, are residents of Leominister, Massachusetts and are co-partners doing business under the name of Daniel D'Onfro's Sons, with a principal office at Leominister, Massachusetts, and are hereinafter referred to as D'Onfro. The defendant, Lizza & Sons, Inc. is a corporation organized and existing under the laws of the State of New York, doing business in this District with an office at Lee, Massachusetts, hereinafter referred to as Lizza.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

2. That on or about August 2, 1955, the defendant, D'Onfro, as Principal, and the plaintiff, as Surety, executed a bond dated as of July 26, 1955 to the defendant,

Lizza, as Obligee, in the amount of Three Hundred Ninety-Two Thousand, Six Hundred Ten Dollars ($392,610.00).

3. That under the terms of said bond, to the amount thereof, D'Onfro, as Principal, and the plaintiff, as Surety, agreed to indemnify and save harmless the defendant, Lizza, from all costs and damage that Lizza may suffer by reason of the failure of D'Onfro to faithfully perform a certain written contract dated July 26, 1955 to furnish all materials and equipment and perform all labor required under Contract No. 51-021, Massachusetts Turnpike Authority.

4. That no contract dated July 26, 1955 was ever executed by D'Onfro and Lizza.

5. That, prior to the date of the bond, July 26, 1955, Lizza had submitted an unexecuted proposed contract to D'Onfro, the terms of which D'Onfro refused to accept. After further negotiations between the defendants, D'Onfro drafted a proposed contract in a form acceptable to it dated August 3, 1955 which was executed for D'Onfro by Daniel A. D'Onfro and submitted to Lizza for execution. On August 16, 1955, Lizza requested of D'Onfro an affidavit or acknowledgment that the signing partner, Daniel A. D'Onfro, was authorized to bind and commit the partnership. On August 18, 1955, D'Onfro requested the return of the proposed contract dated August 3, 1955, for further execution by the D'Onfro partners. On August 30, 1955, Lizza returned the proposed contract dated August 3, 1955 unexecuted by Lizza. After further negotiations between the defendants, D'Onfro drafted another proposed contract dated July 27, 1955 which was executed on behalf of D'Onfro by Ralph D. D'Onfro, Emanuel D. D'Onfro, Virgil S. D'Onfro, Nicholas A. D'Onfro which was delivered to Lizza on September 7, 1955. On September 29, 1955, Lizza, after deleting certain provisions of the proposed contract and initialing the same at the point of deletion, executed and

returned the same to D'Onfro requesting that the same be initialled at the point of deletion by the D'Onfro partners. On October 13, 1955, D'Onfro returned to Lizza a duplicate of said proposed contract without initialing the same at the point of deletion and without assenting to such deletion.

6. That on or about November 14, 1955 Lizza advised the plaintiff that D'Onfro had notified it that D'Onfro did not intend to perform the work required in accordance with the alleged contract dated July 27, 1955 and on or about November 23, 1955, Lizza notified the plaintiff that it was proceeding to do the work contracted for by D'Onfro and would hold the plaintiff responsible for any loss.

7. The defendant, Lizza & Sons, Inc. is claiming:

A. That said instrument dated July 27, 1955, and with such deletion as made by the defendant, Lizza, is a valid and existing contract by and between D'Onfro and Lizza.

B. That said alleged contract has been breached by D'Onfro in that said D'Onfro has refused to proceed with the work required under the terms of said alleged contract.

C. That the bond executed by the defendant, D'Onfro, and by the plaintiff, as of July 26, 1955, is a valid and existing bond and that by the terms of said bond the plaintiff is obligated to Lizza for any damages that it may suffer for failure of the defendant, D'Onfro, to perform said alleged contract dated July 27, 1955.

8. The defendant, D'Onfro, is claiming:

A. That said Lizza and D'Onfro have never agreed upon the terms of a contract and that said instrument dated July 27, 1955 is void and of no effect.

B. That if any such binding contract exists that the defendant, Lizza, breached the same in that said D'Onfro was delayed and prevented by Lizza from performing the work required under the terms of said contract.

9. The plaintiff is claiming:

A. That the instrument dated July 26, 1955 executed by D'Onfro, as Principal, and the plaintiff, as Surety, is void and of no effect in that such obligation on the part of the plaintiff relates to a contract between D'Onfro and Lizza dated July 26, 1955, which contract was never executed.

B. That the bond dated July 26, 1955 is void and of no effect in that at the date of said instrument there was no valid contract existing between D'Onfro and Lizza and no valid contract has been entered into by the defendants since that date.

10. By reason of these conflicting claims the plaintiff is in great doubt as to its obligation, if any, under the terms of said bond dated July 26, 1955.

WHEREFORE the plaintiff demands that the Court adjudge:

1. That said bond dated July 26, 1955, is void and of no effect.

2. That the defendant, Lizza, be restrained from instituting any action against the plaintiff for the recovery of the penal amount of said bond or any part thereof.

3. That if the Court shall determine that said bond is in force that the Court determine whether or not the alleged agreement between the defendants dated July 27, 1955 is a valid and existing contract.

4. That if the Court shall determine that said alleged agreement between the defendants dated July 27, 1955 is a valid contract that the Court determine whether such contract has been breached by the defendant, Lizza.

(s) HUGH J. CORCORAN
Attorney for the Plaintiff
HUGH J. CORCORAN
1387 Main Street
Springfield, Massachusetts

ANSWER OF DEFENDANTS DANIEL A. D'ONFRO, RALPH D. D'ONFRO, EMANUEL D. D'ONFRO, VIRGIL S. D'ONFRO, NICHOLAS A. D'ONFRO,

Co-partners, Doing Business as

DANIEL D'ONFRO'S SONS.

1. The defendants admit the allegations in Item 1.

2. The defendants admit the allegations in Item 2.

3. The defendants admit the allegations in Item 3 in so far as they pertain to the bond but deny that any written contract was ever executed.

4. The defendants admit the allegations in Item 4.

5. The defendants admit the allegations in Item 5 and further state that they advised the defendants, Lizza & Sons, Inc. that any deletions in the contract were made without their consent and that under no circumstances would they approve said deletions, and specifically insisted that the instrument remain in its original form.

6. The defendants deny the allegations in Item 6.

Daniel A. D'Onfro, Ralph D. D'Onfro, Emanuel D. D'Onfro, Virgil S. D'Onfro, Nicholas A. D'Onfro, co-partners, doing business as Daniel D'Onfro's Sons

By (s) Isadore P. Solomon

Their Attorney

ANSWER OF DEFENDANT LIZZA & SONS, INC. TO COMPLAINT.

The defendant, Lizza & Sons, Inc., hereinafter referred to as Lizza, answers the complaint of the plaintiff as follows:

1. The defendant Lizza is without knowledge or information sufficient to form a belief as to the allegations in Paragraph One of the complaint relating to the plaintiff and the other defendants, hereinafter referred to as D'Onfro, and admits the allegations as to itself.

The defendant Lizza specifically denies that the amount in controversy exceeds Three Thousand Dollars ($3000.00) and says that to date it is not possible to determine what, if any, damage has been suffered by it through breach by the defendant D'Onfro of the contract between Lizza and D'Onfro referred to in Paragraph Three of the plaintiff's complaint and therefore it is not possible to establish the amount in controversy between Lizza and the plaintiff as parties to the bond referred to in Paragraph Two of the plaintiff's complaint.

2. The defendant Lizza admits the allegations contained in Paragraph Two of the plaintiff's complaint.

3. The defendant Lizza admits all other allegations contained in Paragraph Three of the plaintiff's complaint but denies that the bond in question refers only to a contract dated July 26, 1955.

4. The defendant Lizza denies the allegation contained in Paragraph Four of the plaintiff's complaint.

5. The defendant Lizza denies all the allegations contained in Paragraph Five of the plaintiff's complaint and says that as between Lizza and D'Onfro there was a complete meeting of minds as to the contract dated July 27, 1955 and that subsequent to that date D'Onfro started to perform their obligations under said contract.

6. The defendant Lizza admits the allegations contained in Paragraph 6 of the plaintiff's complaint.

7. The defendant admits the allegations contained in Paragraph 7, sub-paragraphs A, B and C of the plaintiff's complaint.

8. The defendant Lizza is without knowledge and information sufficient to form a belief as to the allegations contained in Paragraph 8 of the plaintiff's complaint.

9. The defendant Lizza is without knowledge and information sufficient to form a belief as to the allegations contained in Paragraph 9 of the plaintiff's complaint.

10. The defendant Lizza is without knowledge and information sufficient to form a belief as to the allegations contained in Paragraph 10 of the plaintiff's complaint.

AS AND FOR SEPARATE AND COMPLETE DEFENSES, DEFENDANT LIZZA ALLEGES AS FOLLOWS:

1. The defendant Lizza has suffered no damage presently ascertainable arising out of the breach by the defendant D'Onfro of the contract referred to in Paragraph Three of the plaintiff's complaint and has therefore made no demand on D'Onfro for damages resulting from such breach nor has it made any demand for payment by the plaintiff under the terms of the bond referred to in Paragraph Two of the plaintiff's complaint.

WHEREFORE, the defendant Lizza prays that the plaintiff's complaint be dismissed for the following reasons:

1. The matters put in issue by the plaintiff's complaint are uncertain as to ultimate need and occasion for adjudication because damages may never be owed by the defendant D'Onfro to the defendant Lizza and if they are the defendant D'Onfro may pay them.

2. An adjudication of said issues at the present time cannot be a final one since damages are not now ascertainable and there may therefore be occasion to try the same matters in other proceedings and, further, since the defendants Lizza and D'Onfro are not adverse parties in this proceeding even the matters decided will not be res judicata as between them and hence there may be occasion for subsequent trial of the same matters between Lizza and D'Onfro.

3. No substantial damage will be suffered by the plaintiff if there is no determination now of its possible future liability but that substantial damage will be suffered by the defendant Lizza if it is compelled to try in a multiplicity of proceedings matters that can be tried in a single pro-

ceeding or that may never be tried at all if no actual damage is suffered by Lizza or a failure by D'Onfro to pay damages never materializes.

By its attorneys,
CAIN, CHESNEY, LEWIS & CAPELESS
By (s) ROBERT T. CAPELESS
ROBERT T. CAPELESS
29 Wendell Avenue
Pittsfield, Massachusetts

MOTION FOR JUDGMENT ON PLEADINGS.

The defendant Lizza & Sons, Inc. moves the Court to enter judgment for it on the pleadings.

By its attorneys,
CAIN, CHESNEY, LEWIS & CAPELESS
By (s) ROBERT T. CAPELESS

MOTION TO AMEND.

Now comes the plaintiff in the above-entitled action and moves that the Complaint already on file be amended as follows:

1. By striking out in paragraph 2 of said Complaint the following words: "the defendant, D'Onfro, as Principal, and", so that paragraph 2 will now read: "That on or about August 2, 1955, the plaintiff, as Surety, executed a bond dated as of July 26, 1955 to the defendant, Lizza, as Obligee, in the amount of Three Hundred Ninety-Two Thousand, Six Hundred Ten Dollars ($392,610.00)."

2. By striking out in paragraph 3 of said Complaint the following words: "D'Onfro, as Principal, and", so that paragraph 3 will now read: "That under the terms of said bond, to the amount thereof, the plaintiff, as Surety, agreed to indemnify and save harmless the defendant, Lizza, from all costs and damage that Lizza may suffer by reason of the failure of D'Onfro to faithfully perform a certain

written contract dated July 26, 1955, to furnish all materials and equipment and perform all labor required under Contract No. 51-021, Massachusetts Turnpike Authority."

3. By striking out in paragraph 7 C of said Complaint the following words: "by the defendant, D'Onfro, and", so that paragraph 7 C will now read: "That the bond executed by the plaintiff, as of July 26, 1955, is a valid and existing bond and that by the terms of said bond the plaintiff is obligated to Lizza for any damages that it may suffer for failure of the defendant, D'Onfro, to perform said alleged contract dated July 26, 1955."

4. By striking out in paragraph 9 A of said Complaint the following words: "D'Onfro, as Principal, and", so that paragraph 9 A will now read: "That the instrument dated July 26, 1955 executed by the plaintiff, as Surety, is void and of no effect in that such obligation on the part of the plaintiff relates to a contract between D'Onfro and Lizza dated July 26, 1955, which contract was never executed.

(s) Hugh J. Corcoran
Attorney for the Plaintiff.

STENOGRAPHIC RECORD OF TRIAL
Court Room No. 2
Federal Building, Boston
Tuesday, December 11, 1956

[2] The Clerk: Civil Action No. 56-179, Hartford Accident versus D'Onfro and Lizza.

[Conference at the bench between Court and counsel.]

The Court: Before the trial started Mr. Corcoran presented a motion to amend the complaint in four paragraphs. After discussion I said I would not pass on the motion at this time.

Mr. Corcoran: May it please the Court, I am not sure this is a case in which an opening would be helpful or a burden to you. The plaintiff in this case would plan to

attempt to present the case in a chronological order right from its beginning, and in that event I think it might be well if I did not make an opening, unless your Honor sees fit.

The Court: That's all right.

Mr. Corcoran: And start at the beginning.

The Court: Very well.

RALPH DANIEL D'ONFRO, Sworn

Direct Examination by Mr. Corcoran

Q. Would you state your full name, sir? A. Ralph Daniel D'Onfro.

Q. Where do you live, Mr. D'Onfro? A. 712 Main Street, Leominster, Mass.

Q. How old are you, Mr. D'Onfro? [3] A. I am 33 years old.

Q. What is your business? A. I am a member of a contracting firm.

Q. It is a partnership? A. Yes.

Q. Who else is in that partnership? A. My three brothers and my father.

Q. What are their names? A. Emanuel, Virgil, Nicholas, and my father's name is Daniel.

Q. And these are the D'Onfros that are mentioned as defendants or respondents in this case? A. We are.

Q. How long have you been personally in this contracting business? A. In this particular business—this business was organized in 1947.

Q. How long has your father been in the contracting business? A. My father is now 75 years old, and he started when he was approximately 24.

Q. At some time in the spring of 1955 did you have occasion to contemplate bidding on the Massachusetts Turnpike? A. Yes, sir, we did.

Q. As a result of your interest in that what did you do? A. Several times we bid various subcontract jobs for the general contractors bidding on the Toll Road.

[4] Q. What in particular interested you subcontract-wise on the Turnpike Authority? A. We primarily are bridge builders. We put in several bids to various contractors on bridge contracts.

Q. At some time did it come to your attention that Lizza & Sons, Inc. were going to bid on a job that involved the Toll Road in the Lee-Becket area? A. Yes, sir, approximately on May 28, I believe it was, Mr. Lizza called our firm and asked us if we intended to bid on the bridges on a proposed job in Lee that he was bidding.

Q. I see. Did you bid on that job? A. We told him that we were intending to figure the bridges on that particular job for various contractors, and that we would be glad to give him a price.

Q. What in particular was there on this road that interested you, that you felt you could do best? A. I beg your pardon, sir?

Q. Well, you said you were interested in structures. What structures were you interested in on this particular piece of Toll Road? A. We were interested in—at that time, sir, we didn't have the plans, you must understand, and we didn't know what the job was composed of. We knew it had several items for concrete piers, for concrete abutments, concrete footings and concrete culverts. But at that time the number we didn't exactly know.

[5] Q. At some time did you obtain information as to the particular structures that you would be best suited to construct? A. At a future date, sir, we obtained the plans and saw the structures.

Q. Did you eventually submit a bid? A. Yes, we did, sir.

Q. How many other general contractors were bidding on this piece of road? A. I don't know offhand, sir.

Q. This piece of road is approximately 4½ miles long? A. Yes.

Q. Did you submit bids to anybody except the Lizza & Sons, Inc.?

Mr. Cain: It seems to me that is immaterial.

Q. At some time you did submit a bid to Lizza & Sons, Inc., is that right? A. Yes, sir.

Mr. Corcoran: Do you have the original?

Q. Mr. D'Onfro, I show you a sheet of paper with your heading, Daniel D'Onfro's Sons, Inc., which purports to be a carbon copy, and I ask you with the exception of certain pen marks on it, is that a copy of the bid that you submitted to Lizza & Sons, Inc.? A. This is one of the bids. This is one of the papers, yes, sir.

Q. Is that the first one? [6] A. Yes, sir.

Mr. Corcoran: I am going to offer this, if your Honor please.

The Clerk: Plaintiff's Exhibit 1.

Mr. Cain: Do you want to stipulate all the ink marks and notations—

Mr. Corcoran: That's in.

The Court: So noted.

[Daniel D'Onfro's Sons Bridge Quotation, Lee and Becket, marked Plaintiff's Exhibit 1.]

Q. Now this contract is what is called a unit price contract, is it, Mr. D'Onfro? A. Yes, sir.

Q. Would you explain to the Court what that means? A. In our bid, sir, to Mr. Lizza, we bid on items we thought pertained to the bridges. We also bid on items Mr. Lizza asked us to give him an idea about, such as placing the steel and placing the reinforcing bars. We bid so much for each unit, as the case may be, yards in concrete, pounds in steel, and so forth.

Q. Would you explain to the Court—

The Court: On the basis that he could accept some and not all? Is that what you mean?

The Witness: Yes. You bid such as this. You never know what you're going to get.

[7] The Court: All right.

Q. Is it true you submitted this on or about May 29, 1955? A. Yes, sir.

Q. The bids were to be opened on June 1st by the Turnpike Authority on the general contract? A. Yes, sir.

Q. At some time during this period did you have a conversation with Mr. Lizza with regard to the placing and painting of structural steel, you not to furnish the structural steel? A. Yes, sir. In one of the telephone conversations I had with Mr. Lizza, he told me he was going to supply the structural steel, the I-beams for the bridges he had given to the subcontractor, not to bother getting any prices for that. And incidentally, it would have been almost impossible for me to do it at that late stage of the game. But he asked me to give him an idea what it would cost for the erection and painting on this particular item, which I was very glad to do on the telephone, and which I later confirmed June 2nd, I believe, in another quotation.

Q. All right. I show you a paper headed Daniel D'Onfro's Sons, which has typewriting on it and also some pencil marks, and with the exception of the pencil marks I ask you whether or not this is the bridge quotation you sent down to him, which included structural steel erection, painting, which you just testified to? [8] A. Yes, sir.

Mr. Corcoran: I am going to offer this, if your Honor please.

The Clerk: Plaintiff's Exhibit 2.

[Daniel D'Onfro's Sons Bridge Quotation, Lee and Becket, marked Plaintiff's Exhibit 2.]

Q. Now then, in the meantime, this was June 2nd—when did the Turnpike Authority open bids as far as the general

contracts were concerned? A. They opened the bids on June 2nd, sir.

Q. I see. And who was low? A. Lizza Company was low.

Q. Lizza & Sons were low. A. Sir, if I may, I'm not really positive whether it was June 1st or June 2nd, now that I think of it. One or the other.

Mr. Cain: I think it was June 1st.

Q. Now when was the next time that you had any physical contact with anyone representing Lizza & Sons, Inc.? A. Around June 8th, sir, someone from the Lizza firm. I believe it was Al Lizza who called me, and asked me if I was interested in the job in Auburn, another piece of the Toll Road. And I knew myself that if Mr. Lizza gave me this, the contract I already had figured in Lee, this would be about all I could handle. But I asked Mr. Lizza if I could possibly [9] help him and show him the area in Auburn, and help him in any way I could. He said it would be very nice. And we made an appointment to meet each other at the Bancroft Hotel in Worcester on the 10th.

Q. In addition to any conversations you had about this Auburn job was there any conversation about what we call the Lee-Becket job? A. On this particular phone call?

Q. Yes. A. Yes. I was very anxious, sir, to find out if I had this job, if I was going to have this job in Lee-Becket. So I mentioned it to him, and he said the job hadn't been awarded yet, that there was a lot of time to get together.

Q. In keeping with that telephone conversation did you have a meeting with Mr. Lizza? A. Yes, sir. My father and I and Mr. Marino, Mr. Cavello, and Al Lizza, met at the Bancroft Hotel.

Q. Would you identify these gentlemen, please? A. Mr. Lizza is the owner, one of the owners.

Q. Is he in the court room today? A. No, sir, he is not.

Q. All right. A. Mr. Marino, who was there, I understood him to be the project engineer.

Q. Is he in the court room today? [10] A. Project Superintendent. He is.

Q. This gentleman [indicating]? A. Yes, sir.

Q. I see. A. And Mr. Cavello, who was some big man in their office apparently.

Q. During this meeting was there any conversation concerning your bid on the Lee-Becket job? A. After we had looked part of the job site over and were returning to Worcester, I asked Mr. Lizza if he intended giving us this job in Lee, and he smiled at me and said, "How much is in it for me?" I said, "Mr. Lizza, nothing. I figured the job at my cost, and that's all I can do. The price I submitted is what I can do it for." That concluded the conversation.

Q. When is the next time that you had occasion to talk to anybody in the Lizza firm? A. Well, I would like the Court to understand, sir, I have a small business and it's very necessary for me to—

Q. Well, I think you had better wait until I ask the questions, if you will. A. Yes.

Q. Did you at some time after June 10th take a trip to Oyster Bay, which I understand is the home office of Lizza & Sons, Inc.? [11] A. Yes, I did.

Q. What was it that motivated you to take this trip to Oyster Bay? A. Well, sir, we hadn't any work at the time, and it was quite a large job, this Lee-Becket job, and if we weren't going to have the job, if they weren't going to give it to us, we had to get busy and bid some more jobs and get some work lined up. So that's why we took it upon ourselves to go down to Oyster Bay and see what Mr. Lizza was going to do about it.

Q. Can you recall about when this was? A. July 13th, sir.

Q. Who went to Oyster Bay with you? A. We took my mother for the ride and my Dad and myself.

Q. I see. By the way, where is your father now? A. My father is home, sir.

Q. What is his condition? A. Well, sir, he had a shock, cerebral hemorrhage, I believe it is called, sometime in February after this happened. That was last February. And so the doctor strongly advised against any emotional upsets.

Q. All right. So your father and mother went to Oyster Bay. Would you tell the Court in your own words and in your own way what occurred there at Oyster Bay? A. Yes, sir. We drove down, and after the usual trouble finding the place, we went into their office and there met a [12] Mr. Cavello, who I had already met in Auburn.

Q. Do you know yet what his position was with them? A. I knew he was office manager. I don't know for sure what his position was.

Q. Yes. A. Shall I continue?

Q. Go right ahead. A. I met Mr. Cavello, and asked him if Mr. Lizza was there. He told me Mr. Lizza was out, and that he would try to locate him, and he made a few telephone calls, trying to find out Mr. Lizza's whereabouts. In the meantime, on this Auburn trip, I talked very friendly with Mr. Cavello. I kind of liked the fellow, and I confidentially asked him if Al Lizza was going to give us this job or not. And he said, "Ralph, Lizza has to have a kickback of some kind or he's not going to give you the job otherwise."

The Court: What did he say?

The Witness: He said, "Ralph, Mr. Lizza has to have a kickback of some kind. Otherwise you can't have this job. He's got to have something in it for himself."

The Court: All right.

The Witness: So I told him, the same as I told Mr. Lizza, sir, that we figured the job very close and we weren't prepared—at least I wasn't prepared to give him one cent,

and we were very stubborn on that. I bid the job [13] at a price, and that was it. "Well," he told me, "we were probably going to be out in that case." We weren't going to get the job unless we gave him something. We waited for quite some time. Then I began thinking that if I had only the culverts to do—there were four culverts—if I had only four culverts I could do them before winter, and that maybe I could give him, I could give him some money. So I said to Mr. Cavello—it took a long time to decide because I had three or four hours waiting for Mr. Lizza. We went to the car and talked it over with my Dad. Then I came back and said to Mr. Cavello, "If we only had the culverts to do, if we only done the culverts, the concrete, one small item, a fairly big item but only one unit, then I think I could afford to give Al something." He said, "Well, I know one thing, Ralph. He's not going to be satisfied unless he gets something. We'll suggest the plan to him."

Shortly afterwards, approximately an hour or two afterwards, Mr. Lizza showed up, and Mr. Cavello told him my plan, that I would give him some money or give him something if I just had the culverts to do, and Mr. Lizza said, "No, definitely not. You have to do the whole job or none."

Well, then I took my first stand, that I wasn't prepared to give him a thing on the whole job because I figured it close. It was a two-year job. And if he wanted to, he had all the chance in the world to put a profit on my [14] price. Nobody was stopping any general contractor from putting a profit on the subs price on State work. It's a legitimate thing to do rather than chisel it out of the subs.

Well, anyhow, he said, "Well, this is not getting us anywhere. You know I have certain office expenses that go on every day. I've got my girls to pay. I have to make the checks out every month. There are certain expenses I have to go through, that I have to absorb." And, of course, I wouldn't have any of that because I have my own troubles.

And so he said, "Well, let's get a contract drawn up anyway." So he called to his man in the office, whose name I'm not too sure of—it was probably Mr. Gerber or Mr. Pelzer—I don't know which—and they came out and went in a back room to draw up a proposed contract. So my father and I were all excited now. In our own minds we thought we would like to get the heck out of here to recoup our thoughts a little bit. So we said, "All right, Mr. Lizza, you draw up the proposed contract and send it to our house. If we like it we will sign it. If we like it we will sign it and execute it."

And so we were in kind of a hurry to get out of there and we left for Leominster.

Q. Was there any talk about how much, when Mr. Cavello talked about a kickback, in dollars and cents? A. Yes, sir, that came out in the conversation. They [15] suggested—

Mr. Cain: Who was present?

Q. Who was present at the conversation where the talk was how much? A. Mr. Cavello I believe was the first one to suggest $8,000 but it was more strongly brought out by Mr. Al Lizza himself, who suggested a dollar a yard on the concrete, and there were approximately 8,000 yards in the contract. He said, "At least a dollar a yard on the concrete." That's $8,000. That's how the $8,000 figure came in, became established.

Q. You spoke about the culverts. Would you explain to the Court in terms of structures what you were to build or would have built in keeping with your quotation? A. If I had done the culverts alone?

Q. What was contemplated by the bid? A. If I did the whole job?

Q. The whole job, yes. A. There were two double bridges, one bridge carrying easterly traffic and one bridge, one side of the bridge carrying westerly traffic. There were two double bridges, like a foot bridge carrying traffic from

the Appalachian Trail, off the Toll Road, and there were four box culverts carrying water under the Toll Road.

Q. What are box culverts? A. Box culverts, sir are big square pipes. They are built [16] out of concrete, and they are square-shaped, and they carry water under the highway.

Q. Was there to be steel in those three bridges, the two double bridges and the foot bridge you spoke about? Was there to be any steel in those bridges? A. Yes, sir. When you speak of steel, there are two types. There was to be bars, rods in the concrete. That is one type of steel. And there was also to be structural steel to carry the depth.

Q. What steel did you have, if any, in these bridges? A. Well, at this time, sir, I don't know what I had.

Q. I see. At any time did you contemplate putting or placing the steel in the double bridges, that is, the structural steel that was to carry the road itself? A. Yes. We gave them a quotation for that, sir.

Q. By the way, did you see anybody else in the Oyster Bay office when you were there, in addition to Mr. Cavello and Mr. Pelzer? A. My memory is very vague on that, sir. I saw there were two other gentlemen there who were working on plans and, as I say, maybe Mr. Lizza and Mr. Gerber both. I saw them. I don't think I have anything to remember them by.

Q. All right.

The Court: We will take our recess here.

[Noon recess.]

[17] AFTERNOON SESSION

RALPH DANIEL D'ONFRO, Resumed

Direct Examination by Mr. Corcoran, Continued

Q. Now at some time after the visit that you had, you and your father to Oyster Bay on July 13, 1955, did you

receive a communication from Lizza & Sons with regard to a proposed contract? A. Yes, we did.

Q. I show you a letter on Mr. Lizza's letterhead, dated July 19, 1955, addressed to Daniel D'Onfro & Sons, and ask you whether or not this is the communication you received? A. Yes, it is.

Q. With it did you receive the proposed contract? A. Yes, sir.

Mr. Corcoran: I offer this.

The Clerk: Exhibit 3.

[Letter, July 19, 1955, from Joseph F. Marino to Daniel D'Onfro Sons, marked Plaintiff's Exhibit 3.]

Q. Now, Mr. D'Onfro, I show you five typewritten pages and ask you to look at them and tell the Court whether or no that is the duplicate original of the proposed agreement sent along with the letter which has just been put in evidence, Exhibit 3? A. It is, sir.

[18] Q. Now, calling your attention to some of the paragraphs in that letter, I direct your attention particularly to Paragraph 4. Would you read to us what that provides, please? A. [reading]:

> "The Contractor agrees to pay the Subcontractor $2.00 per cubic yard for Class 'A' Trench Excavation. This Class 'A' Trench Excavation is to be done only in the areas pertaining to the items as listed above and to no other part of the Class 'A' Trench Excavation Item."

Q. I ask you, having in mind the bid quotations, which are already in evidence, Exhibits 1 and 2, whether or not Class A Trench Excavation was ever mentioned in your bid? A. It was not, sir.

Q. Was the price of Class A Trench Excavation ever discussed with you by any of the Lizza organization prior to the time you saw it in this agreement here? A. No, sir.

Q. Now in Paragraph 1 of this contract, which describes

the work you were to do and the unit price, there are two items, Items 10 and 11, 10 being Rip Rap at $8.00 a cubic yard and Slope Paving for Bridges being $4.00 per cubic yard. On this exhibit those are crossed out. Did this agreement arrive in your possession with those items crossed out? A. No, sir.

[19] Mr. Cain: For the record "square yard."

Mr. Corcoran: Square yard on the Slope Paving. I offer this.

The Clerk: Exhibit 4.

[Agreement between Lizza & Sons, Inc. and Daniel D'Onfro's Sons, July 25, 1955, marked Plaintiff's Exhibit 4.]

Q. Now you and your partners read this over carefully, did you? A. Yes, sir.

Q. Was there anything about this agreement that did not meet with your approval? A. Yes, sir, there were several things.

Q. So that at some time you brought to the attention of Lizza & Sons that there were parts of the agreement as drawn and sent to you that did not meet with your approval? Is that true? A. Yes, sir.

Q. Did you put these objections down in writing? A. We did, sir.

Q. In a letter dated July 25, 1955? A. Yes, sir.

Q. I show you a letter dated July 25, 1955, on your letterhead. I ask you whether or not, exclusive of the pencil and ink markings on it, exclusive of your father, Daniel D'Onfro's signature, is this the letter you drafted? A. It is, sir.

[20] Q. Would you please read to us the objections which are set forth in that letter? A. [reading]:

"1. Because you are doing all rock excavation, we do not want the Rip Rap or the slope paving.

2. Because there are other items involved in the Class A Trench Excavation we do not want this item.

3. Before our bridge excavation can be done it will be necessary for the Lizza Company to make approaches through swamps or do roadway earth or rock excavation so that our crews can get to the bridge sites.

4. Under Item 2 in your contract, we do not assume any liability for delays not caused by us.

5. Under Item 6 in your contract, Article 34 in the Standard Specifications state that the Engineer for the Massachusetts Turnpike will furnish the staking of the location for the bridge and box culverts.

6. Under Item 8 in your contract, because in all cases the Lizza Company will necessarily [21] be on the job site first, they should obtain necessary permits, property agreements and releases.

7. Under Article 11 in your contract. We will set the anchor bolts for the structural steel if the Lizza Company allows us $5.00 per set or our cost, whichever being the least."

Q. At some time after that was this letter delivered to the people in Oyster Bay, Lizza? A. Yes.

Q. Who delivered it? A. Daniel.

Q. Daniel is your father? A. Yes, sir.

Mr. Corcoran: I would like to offer this.

The Clerk: Exhibit 5.

[Letter, July 25, 1955, from Daniel D'Onfro to Lizza & Sons, marked Plaintiff's Exhibit 5].

Q. Exclusive of what you have just read, there are several markings in pen and pencil. Did you put these markings on there? A. No, sir.

Q. Were they on it when you delivered it to Oyster Bay? [22] A. No, sir.

Q. At some time during this period did you have or cause to be executed a bond or bonds? A. Yes, sir.

Q. What agency served you in this respect? A. The White Company agency.

Q. They are in Fitchburg, are they? A. They are, sir.

Q. I now show you a sheet of paper which entitles itself Contract Bond and draw to your attention in writing Ralph D. D'Onfro. Is that your handwriting? A. It is, sir.

Q. These are the other members of your partnership on it? A. They are.

Q. That bond is in the sum of $300,000, and is dated July 26, 1955? A. Yes, sir.

Q. At some time you had this bond in your possession? A. Yes, sir.

Q. Did you ever make any use of that bond? A. We did not, sir.

Q. Why? A. Because the amount of the bond was too low.

Mr. Corcoran: I would like to offer this.

The Clerk: Exhibit 6.

[23] [Contract Bond, Hartford Accident & Indemnity Co., $300,000, July 26, 1955 marked Plaintiff's Exhibit 6.]

Q. Since that bond was not high enough what did you do? A. My father sent my mother up to the White Company office to make another bond for this amount.

Q. How much is that? A. $320,000, I believe.

Q. On this do you recognize your signature? A. Yes, sir.

Q. And the signatures of your father and your three brothers? A. That is right, sir.

Mr. Corcoran: I offer this $320,000 bond.

The Clerk: Exhibit 7.

[Contract Bond, Hartford Accident & Indemnity Co., $320,000, July 26, 1955 marked Plaintiff's Exhibit 7.]

Q. Referring back to the agreement sent to you by the Lizzas, Exhibit 4, did you or any of your partners sign that agreement? A. No, sir.

Q. Now having drawn the letter of July 25, which is now Exhibit 5, what did you or any of your organization do with regard to it in bringing it to the attention of the Lizza

people? A. Daniel delivered that agreement to Oyster Bay.

Q. You don't know who he talked to there? A. No, sir, I don't.

[24] Q. What was the next contact or communication you had with Lizza & Sons with regard to this matter? A. We redrew a contract.

Q. I see. I show you an instrument of five pages and ask you whether or not this is the instrument you have just testified to as being the redraft of the contract sent to you by the Lizzas? A. It is, sir.

Q. Is this the signature of your father at the end? A. Yes, sir.

Q. And Dorothy D'Onfro is who, the attesting witness? A. My mother.

Q. Can you tell us in what respect this draft of the agreement differed from the one that was sent up to you before, Exhibit 4? A. The main thing, sir, is that on the slope paving and the riprap items, Lizza was to furnish the stone for these items. On Item 7, on Item 14, sir, there was another paragraph, a paragraph (c) that we left off, with regard to penalties, I believe.

Mr. Cain: What paragraph, please?

The Witness: Item 14. We left off paragraph (c).

Q. Now would you explain to the Court what is meant by that riprap item? A. Riprap, sir, is a paving, stone paving that is put on the slopes to prevent erosion. It is usually put around drainage [25] structures and sometimes around bridges. It is composed of fairly large stones weighing, these particular stones, 1500 pounds apiece. Slope Paving is a paving that is made up of rock, stone, and that is put on dirt to prevent erosion, or to put it in a location where the grass can't or won't grow.

Q. With particular reference to the three bridges contemplated by your bid, where would the slope paving be put? A. The slope paving would be placed from the abutments

or from the abutment to the piers, if you understand that.

Q. This work would have to be done, would it, in keeping with the standard specifications issued by the Massachusetts Turnpike Authority? A. Yes, sir.

Q. I show you a book which is entitled Standard Specifications for the Massachusetts Turnpike, dated October 1954, and I direct your attention particularly to Page 111 of that, which is entitled Materials, and I ask you what the specifications are with regard to slope paving of bridges as called for by the Massachusetts Turnpike Authority? A. Materials for Slope Paving.

Q. Slowly, please. A. "Slope Paving at Bridges.

Stone for slope paving at bridges shall be sound, durable rock, free from weathered or decomposed pieces, shattered ends, structural [26] defects, marked lamination, seams or cracks, and acceptable to the Engineer. The stones shall be approximately, rectangular or square in shape, shall not be less than five (5) and not more than seven (7) inches in depth, shall individually weigh not more than about fifty (50) pounds with at least 75 per cent of the stones weighing not less than forty (40) pounds. The upper or exposed face shall be practically flat."

Mr. Cain: Are you going to introduce that?

Mr. Corcoran: I hate to lose it.

Mr. Cain: All right.

Q. Now then, were there some other changes in the agreement as it was redrafted? I don't want to ask you what they were. But were there any? A. Yes, sir.

Mr. Corcoran: I am going to offer this.

The Clerk: Exhibit 8.

[Agreement between Lizza & Sons, Inc. and Daniel D. D'Onfro's Sons, dated August 3, 1955, marked Plaintiff's Exhibit 8.]

Q. Bringing your attention back to the redraft of the

contract as it was caused by you and to the riprap and the slope paving, why was it that the contract was reworded to include the slope paving but calling upon the general contractor to furnish the [27] stone and with relation to slope paving do the fine grading? A. When we realized that Lizza wanted a $8,000 kickback on this contract, we tried to recoup that $8,000. And that is the reason we had Lizza—we wanted Lizza to buy the stone for these items.

Q. Who would be involved in getting this stone to the job site, Mr. D'Onfro? A. As you can see on the specs, the stones are of a particular size, and you would have to go out to a hill composed of ledge, and drill holes and blast and load this material on trucks and deliver it to the job site and then, of course, place the stones.

Q. Confining your remarks just to the slope paving, would there be any other way to obtain stone for slope paving? A. Yes. You could buy it from a quarry. You could possibly buy the rough stone from the quarry and run stone from the quarry, and either truck it yourself or have them truck it to the job site.

Q. Do you happen to know whether or not there was a quarry anywhere near your job site, your bridge sites? A. There was a quarry, sir, approximately six or seven miles away from the bridges.

Q. How much do you figure it would cost you to get stone from the quarry to the job site?

Mr. Cain: I object, if your Honor please. It seems to me all this goes pretty far afield.

[28] The Court: I think you are getting quite far afield.

Q. In any event, this agreement was delivered, was it not, to Oyster Bay? A. Yes, sir.

Q. In the meantime did you receive any communications from Lizza & Sons? A. No, sir.

Q. At some time did you feel another bond should be executed? A. Yes, sir, we did.

Q. Did you ever make any use of the two bonds that are now in as exhibits? A. No, sir.

Q. And what did you feel should be the proper amount of that bond? A. I think Daniel evolved a figure from that contract of $392,000, something in that neighborhood, $392,000.

Q. Do you know whether or not he communicated to the White Company agency that the bond should be in the sum of $392,000-odd? A. I do not know it definitely, no, sir.

Q. Now what is the next contact you had with Lizza? A. Lizza wrote us a letter asking for the rest of the partners to give an O.K., that Daniel sign, I don't know how to word it, but they wanted the authority for Daniel's signature on that [29] first contract. Q. I show you a letter on Lizza & Sons, Inc. stationery, dated August 16, 1955, and ask you whether or not this is the letter to which you refer? A. Yes, sir.

Q. And in the second paragraph what is it they want from you? A. They want our authorization that this business is —they wanted our acknowledgment or affidavit indicating that the signing partner is authorized to bind and commit the entire partnership in this particular undertaking.

Mr. Corcoran: I offer this.

The Clerk: Exhibit 9.

[Letter dated August 16, 1955, from E. S. Pelzer, General Manager, Lizza & Sons, Inc., to Daniel D'Onfro's Sons, marked Plaintiff's Exhibit 9.]

Q. Sometime after this were you in telephone communication with somebody at the Lizza office? A. Yes, we were, sir.

Q. And what was the purpose of the call? A. We called to ask that the contract Daniel had signed be returned to us.

Q. I show you a letter dated August 18, 1955. Did you ask them to return the copies, the three copies, and you would execute them properly? A. Yes, sir.

Mr. Cocoran: I offer this.

[30] The Clerk: Exhibit 10.

[Letter dated August 18, 1955, from Daniel D'Onfro's Sons to Lizza & Sons, Inc. marked Plaintiff's Exhibit 10.]

Q. Did you call them again to get the contract back? A. Yes, sir, we did.

Q. Do you remember when that was? A. I believe around the 18th or thereabouts of August.

Q. Was there a reply from the Lizza people with regard to this subject? I show you a letter on Lizza & Sons stationery, dated August 23rd. A. Yes, sir.

Q. Would you read that letter, please? A. [reading]:

"Daniel D'Onfro's Sons
712 Main Street
Leominster, Massachusetts
Att: Mr. Daniel D'Onfro
Re: Contract 51-021 Lee-Becket, Massachusetts
Gentlemen:

Thank you for your letter of August 18th, 1955 regarding subject contract.

Copies of the proposed agreement between us is presently in the hands of our Mr. Joe Marino for execution and hence cannot, at this time be returned to you.

All that we require now is acknowledgment [31] by all of the several partners of your organziation: That you, Daniel D'Onfro, are authorized to act for and commit the other partners to the agreement in this instance. This can be in the form of a notarized statement or affidavit."

Signed: E. S. Pelzer.

Mr. Corcoran: I offer this.

The Clerk: Exhibit 11.

[Letter dated August 23, 1955 from E. S. Pelzer,

General Manager, Lizza & Sons, Inc. to Daniel D'Onfro's Sons, marked Plaintiff's Exhibit 11.]

Mr. Corcoran: Do you have a letter dated August 30, 1955?

Mr. Cain: This is self-serving, your Honor.

The Court: May I look at it? Has this been read into the record?

Mr. Corcoran: No, your Honor.

The Court: What is your objection?

Mr. Cain: Well, in many parts it is self-serving. That is the objection.

The Court: It seems to me it has some other purpose besides that.

Mr. Cain: All right.

The Clerk: Exhibit 12.

[Letter dated August 30, 1955, from Ralph D'Onfro, Daniel D'Onfro's Sons, to Lizza & Sons, Inc., marked Plaintiff's Exhibit 12.]

[32] Q. Right after this did you receive another communication from Lizza & Sons with regard to this contract? A. Yes, we did.

Q. I show you a letter dated August 30, signed by Mr. Pelzer, General Manager, and ask you whether or not this is the letter of August 30th which you received? A. It is, sir.

Mr. Corcoran: I offer this.

The Clerk: Exhibit 13.

[Letter dated August 30, 1955, from E. S. Pelzer, General Manager, Lizza & Sons, Inc., to Daniel D'Onfro's Sons, marked Plaintiff's Exhibit 13.]

Q. Would you read that short letter, please? A. [reading]:

"Daniel D'Onfro's Sons
712 Main Street
Leominster, Massachusetts
Re: Contract 51-021 Lee-Becket,
Massachusetts Turnpike Authority
Att: Mr. Ralph D'Onfro
Dear Sir:

In conformity with instructions of our Mr. Joseph Marino and your request of August 26, 1955, we are returning the contract, in three counterparts, which you forwarded to us.

We will appreciate return of the contracts for final execution upon your proper completion."

[33] Signed: E. S. Pelzer.

Q. On or about this time did you make up a so-called supplementary agreement? A. Yes, we did.

Q. What was the purpose of the supplementary agreement? A. We hadn't received the contracts back that my father had signed so my father thought it very necessary that we write this supplementary agreement, and it contained a paragraph stating that if Lizza did any work on the job that he would only—for us, that is—he would only get paid itemized prices.

Q. At some time did Daniel go to meet anyone from the Lizza people about this supplementary agreement? A. Yes, sir, he delivered that agreement to the Lee office.

Q. Do you know when that was? A. The 30th of August, I think.

Q. Now at some time did you have the agreement redrafted again? A. Yes, we did, sir.

Q. I show you a five-page instrument and ask you to read it, and I ask you if this is the next redraft of that contract? A. Yes, it is, sir.

Q. And what changes, if any, are there with regard to

Riprap and Slope Paving? A. The Riprap item is left out, sir.

[34] Q. What about the slope paving? A. The slope paving item is still in and Lizza is to supply the stone for this item.

Q. And the fine grading? A. Yes, sir.

Q. I call to your attention that on Page 2 there are lines drawn through that section dealing with slope paving, and it is initialed, and that on the last page it bears signatures. As that went down to Lizza were there any signatures on it? A. Yes, sir. My brothers and I had signed it.

Q. Had your father, Daniel, signed it? A. No, he didn't sign it.

Mr. Corcoran: I offer this.

The Clerk: Exhibit 14.

[Agreement dated July 27, 1955, between Lizza & Sons, Inc. and Daniel D'Onfro's Sons, marked Plaintiff's Exhibit 14.]

Q. Do you know how this Exhibit 14 got into the hands of the Lizza people? A. It was sent, I think, to them.

Q. I show you a letter on the Lizza letterhead dated September 14, and I ask you whether or not that is a letter which you received sometime after the 14th? A. Yes, sir.

Q. Would you read this letter, please? A. This was written to Daniel D'Onfro's Sons:

[35] "Gentlemen:

Re contract re-typed by you and submitted to us by Mr. D'Onfro, Senior, by hand.

Please be advised that we notice that you have deleted Item C-17-1 Rip Rap from this contract without our consent. Your original quotation submitted to us contained this item as per specification requirements. We now wish to advise you after verbal conversation with you that this item has been deleted from your contract by us and given to the drainage contractor.

We also wish to call your attention to the addition you have made to Item C17-3, Slope Paving for Bridges, in that you state that we, Lizza & Sons, Inc., are to supply the stone needed for this item. May we remind you that in your original quotation you quoted this item as per specification requirements. The only conversation concerning supply of stone was in connection with Rip Rap which has been deleted from your contract. No mention was ever made concerning Slope Paving for Bridges."

Mr. Corcoran: I offer this.

[36] The Clerk: Exhibit 15.

[Letter dated September 14, 1955, from Joseph F. Marino, Project Manager, Lizza & Sons, Inc., to Daniel D'Onfro's Sons, marked Plaintiff's Exhibit 15.]

Q. On September 19th did you write another letter to the Lizza people? A. Yes, sir.

Q. I show you a photostat of a letter and ask you whether or not that is a copy of a letter that you wrote to them on September 19th? A. Yes, sir.

Q. That was delivered by your father, was it? A. It was, sir.

Mr. Corcoran: Do you want to compare it with what you have got there?

Mr. Cain: No, that is all right.

Mr. Corcoran: I offer this.

The Clerk: Exhibit 16.

[Letter dated September 19, 1955, from Ralph D. D'Onfro, Daniel D'Onfro's Sons, to Lizza & Sons, Inc., marked Plaintiff's Exhibit 16.]

Q. Would you read this letter, please?

A [reading]:

"Attn: Mr. J. F. Marino

Dear Sir:

Before we prepared our proposal for the Lee job,

we took in consideration that if [37] you were the successful bidder we would order a truck crane and purchase sufficient plywood and start work about June 25, 1955. To date we haven't an executed agreement.

For reasons beyond our control practically four months have gone by and no work has been done on the structures.

We want to make it clear that Daniel D'Onfro's Sons shall in no event be responsible for any penalties or other charges, except the payment of $8,000.00 referred to in the agreement.

For the reason stated above, you may sub-let the slope paving to the same concern you gave the rip rap to."

Q. Did you receive a reply to that letter? A. Yes, we did, sir.

Q. I ask you whether or not this is the reply? A. Yes, sir.

Mr. Corcoran: May it be marked?

The Clerk: Exhibit 17.

[Letter dated September 23, 1955, from Joseph F. Marino, Projects Manager, Lizza & Sons, Inc., to Daniel D'Onfro's Sons, marked Plaintiff's Exhibit 17.]

Q. Would you read this letter, please? A. Yes, sir. [Reading]:

[38] "Attention: Mr. R. D'Onfro

Re: Contract 51-021, Massachusetts Turnpike,

Gentlemen:

We are in receipt of your letter dated September 19, 1955.

Please be advised that the time that has been lost on this contract is through no fault of ours. We are waiting for the Authority to approve you as sub contractor for Structures. Incidentally, the time actually gone by is not four months as you state for this reason,

the job was let on June 1, 1955—the Authority can award this job 30 days after letting which makes it July 1, 1955. They then require 10 days to sign and execute the contract making it July 11, 1955. Therefore, in view of the above we cannot see how you could have started your work on June 25th. We expect an extension of time due to the Authority's delay in approval which will be automatically granted to you.

As for your last paragraph, we wish to advise you that this item C17-3 as quoted by you cannot be subject to anyone else. Your [39] quotation for this item to be done per plan and specification will have to remain in your contract as originally quoted."

Q. And the item he refers to, C-17-3, is what? A. Slope Paving, sir.

Q. Did you receive a letter dated September 27, 1955, from Mr. Marino? A. Yes, sir.

Q. Is this the letter? A. Yes, sir.

Mr. Corcoran: May it be marked?

The Clerk: Exhibit 18.

[Letter dated September 27, 1955, from Joseph F. Marino, Projects Manager, Lizza & Sons, Inc. to Daniel D'Onfro's Sons, marked Plaintiff's Exhibit 18.]

Q. Would you read that letter, please? A. [reading]:

"Attention: Mr. D'Onfro

Gentlemen:

This will confirm our telephone call on September 26, 1955 advising you that you were approved as subcontractor to do work on the above mentioned project by the Massachusetts Turnpike Authority.

Please place all necessary material [40] orders, etc., in connection with your work so that work can be started without further delay. Forward as soon as possible to our main office any and all insurances required plus detailed schedule of your operations.

An executed copy of the contract is being mailed out to you immediately."

Q. In keeping with the provisions of this letter did you in fact place any necessary material orders in connection with that work? A. I did not, sir.

Q. Why? A. Because I hadn't received the contract in my hand as yet.

Q. Eventually did you receive an agreement back from the Lizzas? A. Yes, sir.

Q. I show you a letter dated September 29th to you by Mr. Pelzer of Lizza & Sons addressed to Daniel D'Onfro's Sons and ask you whether or not you recognize that as a letter you received from him? A. Yes, sir, it is.

Mr. Corcoran: May that be marked?

The Clerk: Exhibit 19.

[Letter dated September 29, 1955 from E. S. Pelzer, General Manager, Lizza & Sons, Inc. to Daniel D'Onfro's Sons, marked Plaintiff's Exhibit 19.]

[41] Q. Would you read Exhibit 19, please, the body of the letter? A. [reading]:

"Enclosed find original and duplicate of agreement between us in connection with referenced contract.

The agreement is completely executed except for the initialing by your partners of the correction on page two (2) of the agreement. This change is in accordance with your original quotation and with letter dated 9-14-55 of our Mr. J. F. Marino.

Upon initialing by all partners of your concern kindly return original of contract to us.

Your attention is directed to Article 46 of the Standard Specifications covering insurance requirements. It is requested that you supply the necessary certificate (in duplicate) to us at your very earliest convenience."

Q. I show you Exhibit 14 again and ask you if that is

the form in which the agreement came back to you, in keeping with this letter of September 29th? A. It is, sir.

Q. Unlike the agreement which you sent to them, what changes were made? [42] A. The paragraph that contained the statement that Lizza was to supply the stone for the slope paving item was crossed out and initialed E. L.

Q. And on the signature page what changes are made? A. None.

Q. Is it signed? A. Yes, sir.

Q. "Attest: E. S. Pelzer" and signed "Elva E. Lizza." On October 4th did you write a letter to Lizza & Sons with regard to the contract? A. Yes, we did.

Q. I show you a copy and ask you whether or not that is a copy of an original which you sent to Lizza & Sons? A. Yes.

Q. Would you read it, please? A. [reading]:

"Attn: Mr. J. F. Marino

Dear Sir:

October 3, 1955, we received two prints of agreement out of three signed by Lizza & Sons, Inc., but they have not affixed the corporation seal.

Some modification was made on the Slope Paving Item, by crossing out furnishing the stone and grading. We want this item to [43] remain as it was or eliminate it entirely from the agreement.

Return the third copy of agreement so we can correct it and we will deliver the three in person to Oyster Bay, New York, for final execution."

Mr. Corcoran: Would you mark that?

The Clerk: Exhibit 20.

[Carbon copy of letter dated October 4, 1955 from Ralph D. D'Onfro, Daniel D'Onfro's Sons, to Lizza & Sons, Inc., marked Plaintiff's Exhibit 20.]

Q. Do you know how this letter, this copy, which is Exhibit 20, got to the attention of the Lizzas? A. Yes, sir.

Q. How? A. My father delivered it to the Lee office immediately.

Q. What was the purpose of his visit to the Lee office on October 4? A. To make sure this letter was enforced. We wouldn't stand for this paragraph being deleted.

Q. Do you happen to know who he talked with there? A. Yes, sir.

Q. Who? A. Mr. Robert Thomas.

Q. Did you then receive a letter signed by Mr. Marino dated October 11th? [44] A. Yes, sir.

Q. I ask you whether or not that is the letter you received? A. Yes, sir.

The Court: Do you gentlemen want a recess?

Mr. Corcoran: We are used to having the Court tell us.

The Court: I wasn't planning to take any. If you gentlemen want one—

Mr. Solomon: I would like about five minutes, if I may.

[Recess.]

Q. As I understand it, in the last exhibit, a letter from Mr. Marino to you, you were asked or told "we are waiting the return of one copy of the executed contract." In answer to that letter, what did you do? A. I wrote a letter protesting their crossing out, and my father delivered it to their Lee office, and protested verbally and got a letter to Mr. Thomas to be forwarded to the office.

Mr. Cain: Where are we now?

The Court: Back where we were before the recess. This is repetition. This is in early October. What about the letter of October 11th? Has that gone in?

The Clerk: Exhibit 21 is the last exhibit number I have.

Mr. Corcoran: Do you have a covering letter, [45] October 13th? I think it ought to go in.

Q. I show you a photostatic copy of a letter dated October 13, 1955, addressed to Mr. J. Marino. Was this signed by you? A. Yes, sir.

Q. And what does this letter say? A. [reading]:

"At your request we herewith return one copy of contract."

Mr. Corcoran: I offer this.

The Clerk: Exhibit 22.

[Letter dated October 11, 1955, from J. F. Marino, Projects Manager, Lizza & Sons, Inc. to Daniel D'Onfro's Sons, marked Plaintiff's Exhibit 21;

Photostatic copy of letter dated October 13, 1955, from Ralph D. D'Onfro, Daniel D'Onfro's Sons, to Lizza & Sons, marked Plaintiff's Exhibit 22.]

Q. I show you Exhibit 14. Is that the one copy of the contract which you say in that covering letter that you are returning? A. Yes, sir.

Q. Now from the time you received this contract until the time you returned it with the covering letter, which has just gone in, did you do anything with regard to that agreement? A. Yes, sir. I protested the agreement.

Q. Did you ever sign it in any way? A. No, sir.

Q. Did you or any of your partners initial it at the place [46] where Mr. Lizza initialed it? A. No, sir.

Q. I show you a letter dated October 19th on your stationery. Do you recognize the signature? A. Yes, sir.

Q. Whose is it? A. My father's.

Q. What does he say in that letter? A. [reading]:

"Before we can start the construction of the concrete culverts on your Lee contract you must have them graded to the proposed elevation, in order for us to lay the reinforcing steel for the concrete floors.

You must remove to the original grade the excavated material which you have piled up on the easterly side of the culvert at Sta. 122, in order that the crane and cement trucks can operate along the culvert. The water from the existing concrete culvert at St. 122 must be diverted."

Mr. Corcoran: I offer this.

The Clerk: Exhibit 23.

[Photostatic copy of letter dated October 19, 1955, from Daniel D'Onfro, Daniel D'Onfro's Sons, to Lizza & Sons, Inc., marked Plaintiff's Exhibit 23.]

[47] Q. Following this did you take a trip to Lizza's office at the job site in Lee? A. Yes, sir.

Q. When was this? A. October 18 or 19, the 18th, I think.

Q. Did you have any communications from anyone in the Lizza organization that sent you up to Lee on the 19th? A. Yes, sir. Bob Thomas called me on the 18th and told me to get up there.

Q. Who is Bob Thomas? A. Bob Thomas was their office engineer.

Q. Did he say anything further at that time? A. I didn't want to go up there. I told him I didn't have a contract as yet. He told me not to worry, that the contracts would be fixed, to get up on the job and get going, that the Toll Road Authority was hollering at him.

Q. Did you go? A. I went up there on the 19th, the next day, sir.

Q. What did you do on the 19th when you were up there? A. I looked the job site over to see if they were ready for me to go to work.

Q. What did you find? A. It was not ready, sir. I made a stake out. There was much Class A trench excavation to be done before I could get in there.

[48] Q. Incidentally, is Class A trench excavation in Exhibit 14? A. It is not, sir.

Q. Would you go ahead? A. Well, I saw nothing could be done. Prior to Bob Thomas calling me up, the Toll Road Authority told me to get up there, and asked me why I wasn't on the job. I told them I had contract difficulties and that I couldn't go up there before they were straightened. Bob Thomas called me on the 18th. I went out on

the 19th and saw they couldn't start. I was concerned that the Toll Road Authority might look down at me for possibly holding Lizza up. So after I saw the excavation wasn't ready and I couldn't go to work I arranged a meeting with Dick Downie, the resident engineer, for that particular job, for the next day with Bob Thomas.

Q. All right. As a result of arranging that meeting did you in fact meet with any representative of the Turnpike Authority? A. Yes, sir, I did.

Q. Where did you meet? A. I met at Dick Downie's office.

Q. What was he again? A. He was the resident engineer for Brown & Blavvelt, who were the engineers handling that particular job for the Turnpike.

Q. This meeting place was right there in Lee, close to the job site? [49] A. Not too close, approximately within a mile or so, two miles, maybe.

Q. Who attended that meeting again? A. My father came up that day to attend the meeting. I thought it was very important. There was myself, Mr. Dick Dowrie, Bob Thomas, and another man, whose name I don't know. He recorded everything we said. He took notes on what we said.

Q. What was said at that meeting? A. I told the Toll Road Authority that up until that time I had no contract. I had contract difficulties, and that the work wasn't ready for me. I couldn't do a darned thing. More excavation was to be done, water had to be diverted. I had no Class A trenches. It was their job to do that. I couldn't start work then, and I didn't want the Toll Road Authority to hold me responsible. Bob Thomas, in the presence of the engineer told me the contract could be taken care of and would be fixed. As far as the work went, he would put his men to work Saturday and Sunday, if he had to, to get the thing

ready for me for the following Monday. So we left after that.

Q. When you spoke about contract difficulty, was there any reaction from Mr. Thomas on that? A. Yes. He told me and the Authority, both, that it would be taken care of, it would be fixed.

Q. Was he pleased that you were bringing it to the attention [50] of the Turnpike Authority concerning these contract difficulties?

Mr. Cain: I object to that.

The Court: Excluded.

Q. When you referred to contract difficulties what specifically were you referring to, Mr. D'Onfro?

Mr. Cain: I object unless it is conversation.

Q. All right, what was the conversation specifically with regard to contract difficulties? A. I had told Bob Thomas before then that we had trouble with the supplying of the riprap and the slope paving. Outside of that I didn't tell any conversation in front of the Toll Road Authority. I just said that we had contract difficulties.

Q. Did you have any discussion with Bob Thomas concerning the slope paving? A. No, sir. I don't believe I did. He just knew there was contract difficulties but not what they were.

Q. At any time did you have any conversation with any of the Lizza people with regard to the slope paving and what was involved? A. I beg your pardon on the last question?

Q. At any time did you have any conversation with the Lizza people with regard to the slope paving which you discussed in the letters? A. Yes, sir.

Q. When? [51] A. When my father went up there protesting the item to Bob Thomas with the letter.

Mr. Cain: May we fix the time of that?

Mr. Corcoran: Yes, sure.

Q. When was that, Mr. D'Onfro?

The Court: Early October?

The Witness: Yes, sir, it was.

Mr. Cain: I beg pardon?

The Court: Early October.

Mr. Cain: That is the October 4th episode?

The Witness: Yes, sir.

Q. Was there any other time when this slope paving item was discussed? A. It was discussed after this period, sir.

Q. When? A. Well, I was on the job with my equipment at the time, and I saw Mr. Lizza.

Q. All right. As a result of this meeting with the Turnpike Authority on the 20th did you show up on the job site at some time? A. Yes, sir.

Q. When? A. The following Monday.

Q. This meeting was on the 20th. You went up there the following Monday? [52] A. Yes, sir.

Q. Did you go up alone? A. No, sir. I sent some men and equipment up there. I located my crane. I sent a couple of loads of lumber, 10,000 feet or so, and I brought four men with me.

Q. You brought a crane, four men, and lumber, is that about it? A. Yes, sir.

Q. Now, by the way, about these men, what were they qualified to do? A. They are bridge men. They are qualified to do most any work I have for them to do.

Q. I see. What did you find when you arrived at the job site on October 24th? A. The culvert was in practically the same condition I saw it in before I left for home on the 19th. The 20th—nothing had been done anyway.

Q. Did you talk to anybody up there representing Lizza? A. Yes, I did.

Q. Who did you talk to? A. I talked to Thomas. I wondered why he hadn't it fixed ready for me. I also met Mr. Ferrara at that time.

Q. Who is Mr. Ferrara? A. Mr. Ferrara was, I think, acting superintendent at that particular stage of the game.

The Court: For Lizza?

[53] The Witness: For Lizza, yes, sir.

Q. What happened on succeeding days, if anything? A. Nothing, sir. I waited with my men and didn't do anything. We just sat there.

Q. How long did you wait? A. Until, I think it was four days, until the 26th or the 27th, sir.

Q. You were there with your men and your equipment? A. Yes, sir.

Q. During this time did you have your men doing any work? A. No, sir.

Q. Was there any work that they could have done while they were there? A. Yes, sir. We could have set up. We could have built forms.

Mr. Cain: You could have what?

The Witness: We could have built forms or set up a shack, built a maintenance shack for ourselves. I wouldn't let them work.

Q. Why wouldn't you let them work? A. Because I had no contract, sir.

Q. Now we have gotten to October 27th. At some time did you send your men home? A. Yes, sir.

Q. When was that, if you can recall? [54] A. I think I sent the men home the day before I went home. I think I went home the 27th or the 28th.

Q. And during this period, the 25th, 26th, 27th, and 28th, did you have occasion to talk to anyone representing the Lizza company? A. Yes, sir. As I said before, I talked to Mr Ferrara.

Q. Did you have occasion to talk to Mr. Lizza? A. Yes, sir. On the day I went home I talked to Mr. Lizza.

Q. Where did the conversation take place? A. In his office area, sir.

Q. And this is the day you went home? A. Yes, sir, the same day.

Q. Was there anyone else present at this conversation? A. Mr. Ferrara, myself and my father.

Q. What was that conversation? A. Well, Mr. Ferrara, Mr. Lizza—Mr. Lizza said, "How are things going?" I said, "Well, sir, I haven't a contract yet. You know the work is not ready." And he said, "Well, don't worry about the contract. And as far as the work goes, I have instructed my men to bend over backward to see that the work is ready."

Q. Was anything said about the slope paving at this meeting you can recall? A. No, sir.

Q. Later on did anyone from your organization go up to the [55] job site again? A. Yes, sir. My brother Manny did on some Sunday thereafter and saw that still nothing was done.

Q. Now later on did you personally have occasion to go up to the job site? A. Yes, sir. I believe it was the early part of November, probably around the 8th or the 9th.

Q. Do you recall any communication between you and anyone from Lizza between the time Emanuel went on October 30th and the time that you went on November 9th? A. No, sir.

Q. All right. So you personally went to the job site on November 9th? A. Yes.

Q. Was anyone else with you? A. My brother Emanuel and my father went with me, sir.

Q. And what did you find when you arrived there? A. Well, the conditions were pretty much the same as before. No work had been done. I saw a big pipe where they were getting ready to divert the water, but there was no apparent change. I couldn't go to work.

Q. Did you talk to anybody? A. Not on that date, no, sir.

Q. Did you return to your home in Leominster on the ame day? A. Yes, sir.

56] Q. What did you do when you returned? A. I wrote letter to Mr. Lizza, sir.

Mr. Cocoran: Do you have it?

Mr. Cain: Yes [handing paper to Mr. Corcoran].

Q. I show you a letter dated November 9, 1955, on your tationery, addressed to Lizza & Sons, Oyster Bay, and I all your attention to the second page. Is that your signa- ure? A. Yes, it is, sir.

Q. And this is a letter you just testified you wrote on November 9th, when you returned? A. Yes, sir.

Q. Would you read the letter please?

The Court: You don't need to read as long a letter as hat. If you want me to read it now, I will.

Mr. Corcoran: I will put it in this way. I offer it.

The Clerk: Exhibit 24.

[Letter dated November 9, 1955, from Ralph D. D'Onfro, Daniel D'Onfro Sons, to Lizza & Sons, Inc., Oyster Bay, New York, marked Plaintiff's Exhibit 24.]

Q. Was this letter delivered to Oyster Bay? A. Yes, sir, t was.

Q. When? A. Delivered possibly the same day or the day after.

Q. Did you accompany your father on this trip? A. No, I didn't, sir.

[57] Mr. Gerber: I didn't get the answer.

Mr. Corcoran: No, he didn't. Do you have another letter, dated the same day?

Mr. Gerber: No, we do not.

Mr. Cain: How was it delivered?

Mr. Corcoran: In hand.

Mr. Cain: To whom?

Mr. Corcoran: I think Lizza.

Q. Mr. D'Onfro, turning your attention to the slope pav-

ing item, which was in the first contract and out of the second and third contracts, the last one being Exhibit 14, the one which was deleted, would you tell the Court why it was that you were insistent through all this correspondence and again in the initialing of this particular item, why you were insistent that it either be eliminated entirely, as you say in your letters—

The Court: Either what?

Mr. Corcoran: I beg your pardon.

Q. —eliminated entirely or that Lizza furnish the stone and do the fine grading?

Mr. Cain: I'm sorry. I didn't catch the gist of the question.

The Court: He wants to know why the witness has always taken this position he has with relation to that.

Mr. Cain: I object to it.

[58] The Court: I believe it's already in evidence unobjected to as far as I'm concerned.

Mr. Cain: And excluded?

The Court: No.

Mr. Cain: Unobjected to?

The Court: Yes, unobjected to.

Mr. Cain: I thought at one time I objected to a "Why" question like that.

The Court: You may well have. I recall some testimony which I will go back and review, if you want me to.

Mr. Solomon: That pertained to the cost, I think, your Honor, of drilling and blasting the stone. And I think you indicated we were getting far afield.

The Court: Oh, yes. That was as to whether it came out to the $8,000 or not. The witness has already testified without objection that because of the $8,000 differential Lizza wanted to have, which he termed a kickback, the D'Onfro partnership figured they had to get it back some way and this is the way they were going to do it. I heard

no objection to that testimony, and I assume this is what is being asked for again.

Mr. Cain: If it is in once, I object to it going in again.

The Court: I don't need it again.

Mr. Corcoran: Would it be difficult to get the [59] question back?

The Court: The question is excluded as repetitious.

Mr. Corcoran: I don't understand, your Honor.

The Court: You make me your offer of proof.

Mr. Corcoran: I would like to make an offer of proof. If the witness answered this question, the answer would be that in order to obtain the stone for the slope paving, as he figured it, he might have to go about six miles to a quarry, in order to furnish the stone, that he had to have 4,000 square yards—I say 4,000—3,970 square yards would be necessary in order to do the job, and that in buying this stone from the quarry he figured he would have to pay $1.50 a ton or $3.00 a cubic yard, as I understand it 2 tons is approximately a cubic yard, and that in figuring this out he felt in order to get the stone to the job site, taking into consideration his experience in what it costs him to haul stone and to buy the stone, and buying the stone at quarry run, which would mean that he would have to buy quite a bit more than was usable, under the specific qualifications that we read into the record, that it would cost him he felt somewhere in the neighborhood of $15,200 merely to get it on the site, and that in order to lay it as called for, it would cost him approximately $3,000 a square yard. In view of the fact this item is in the contract, is in there for $15,800, he comes close to having a loss before he even lays it. [60] And that his testimony would finally be that his loss, if he had to do it, in keeping with the original contract that was sent up, it would cost him more than the $8,000 kickback. That is the specific offer of proof, if your Honor please.

The Court: I can't see that I have any interest in the dollar computation. Everything else in that offer of proof is already substantially in evidence.

Mr. Corcoran: Do I understand it is still excluded?

The Court: Yes. When you're asking the witness what his frame of mind was, why he wanted to do something—I would have objected long ago.

Mr. Corcoran: I submitted that, if your Honor please, on the basis that it might bear upon his intentions, and I felt the intentions on both sides you might find relevant.

The Court: I exclude it for the reason given.

Mr. Corcoran: That's all, your Honor.

Cross-examination by Mr. Solomon

X-Q. Mr. D'Onfro, prior to the time that you submitted a proposal to Mr. Lizza for the work on the Lee-Becket job, had you ever had any conversation or any correspondence with anyone concerning a kickback? A. No, sir, none whatever.

X-Q. And at the time you submitted those proposals which have [61] been introduced here in evidence did you have any knowledge that a kickback was going to be asked of you? A. No, sir.

X-Q. And is it not a fair statement, sir, that the first time that you heard any mention made of a kickback was when you met with Mr. Lizza in Auburn? A. That's right, sir.

X-Q. And at that time you testified there was no talk about the amount of any kickback? A. No.

X-Q. And you told him that you had figured this job on your cost plus a reasonable profit?

Mr. Cain: If your Honor please—

A. Yes, sir.

Mr. Cain: Go ahead and finish.

X-Q. Is that not so? A. Yes, sir.

Mr. Cain: I don't know what the Federal Rule is, but this is his own client that he is cross-examining.

The Court: He is entitled to cross-examine him but only within the scope of the original direct examination.

Mr. Cain: I was thinking of the leading nature of the question.

The Court: I think you will find the rule is the same as it is in the State Court.

[62] X-Q. And is it not a fair statement, sir, that the first time—

The Court: I might advise counsel that the more he leads his witness, the less likely I might be, if I were in doubt, as to whether I would believe him or not.

Mr. Solomon: That point is well taken, your Honor.

Mr. Cain: I call your Honor's attention to the effect it has on the co-defendants, who are really the only antagonistic parties here. Your Honor sees the picture.

The Court: I see the point, and that is why I gave the advice I just did.

X-Q. And the next talk you had, sir, as you testified, was when you went to Oyster Bay and talked to Mr. Lizza in his office there, is that right? A. Yes, sir.

X-Q. Now you did not execute an agreement on that day, did you? A. No, sir.

X-Q. And you never executed the original draft of agreement that was sent to you by Mr. Lizza? A. No, sir.

X-Q. And that draft of agreement, sir, as you read it, did it contain any statement with reference to the $8,000 that you were to turn back to him, sir? A. Yes, sir.

X-Q. You subsequently drafted a new agreement? A. Yes, sir.

[63] X-Q. Which agreement was dated August 3rd? A. Yes, sir.

X-Q. 1955? A. Yes, sir.

The Court: Could I interrupt you, Mr. Solomon? Where

is this reference to the $8,000? That probably is something I did not see.

Mr. Solomon: It is in the original agreement, sir.

Mr. Cain: Paragraph 13.

The Court: Perhaps I might look at that.

[A pause.]

X-Q. From the contents of this original draft agreement plus the conversation that you had with Mr. Lizza you knew, did you not, sir, that he required $8,000 before he would give you a contract? A. Yes, sir.

X-Q. Now did you have any conversation with Mr. Lizza or anyone in his employ as to the manner in which your negotiations were to be consummated? A. Through the contract, sir.

X-Q. Did you talk to Mr. Lizza about that?

Mr. Cain: I object. It doesn't seem to have been covered on direct examination.

Mr. Solomon: It's in evidence, if your Honor please.

The Court: I find it very hard to disassociate it. [64] Go ahead.

X-Q. Was it not understood between you and Mr. Lizza that your negotiations were to be consummated by a written agreement? A. Oh, definitely, yes.

X-Q. Now you did not sign this first draft agreement, did you? A. No, sir.

X-Q. But after you received it and after some correspondence you drew a second draft agreement? A. Yes, sir.

X-Q. And that agreement, sir, is dated August 3rd? A. Yes, sir.

X-Q. Now in the terms of this second draft agreement you included, and I think you testified to this, that the contractor was to furnish the stone for the riprap and the slope paving? A. Yes, sir.

X-Q. And you made some other changes in the contract? A. Yes, sir.

X-Q. So that it was in effect different from the original draft contract that you received from Mr. Lizza? A. Definitely.

X-Q. Your father, you say, signed this contract and you sent it to Lizza? A. Yes, sir.

X-Q. From the time you sent this contract to Lizza until the date that it was returned to you did you or anyone in your [65] firm to your knowledge receive any communications, either oral or in writing, concerning the stone for the slope paving? A. No, sir.

Mr. Cain: Until what date?

Mr. Solomon: Until the contract was returned to the D'Onfros.

Mr. Cain: I think there were letters.

X-Q. To clarify this, do you remember when this contract was delivered, this second draft contract was delivered, to Lizza? A. It was around August 3rd, August 3rd or August 4th.

X-Q. And from August 3rd or 4th, sir, until September 2nd, which was the date that this second draft contract was returned to you, did you ever receive any communication, either oral or in writing, complaining to you about the fact that Lizza was to furnish the stone for the riprap and the slope paving? A. You're a little confused, sir. This is the wrong letter.

X-Q. I might be wrong. A. The letter asking for the return of the contract is August 18th, I believe.

X-Q. When were the contracts sent back to you? Do you remember that? A. The latter part of August.

X-Q. The latter part of August? A. Yes, the last of the month. It was either the last of August or the first of September.

[66] X-Q. Let me ask you again: From August 3rd, the

date the contract, the second draft contract was delivered to Lizza, until the contract finally came back into your possession, which you say was around the end of August, did you ever receive any complaints? A. No, sir.

X-Q. From Lizza? A. No, sir, except for the signature.

X-Q. Now you had asked Lizza, had you not, in correspondence and by telephone call to return the contract immediately so that it could be properly executed? A. Yes, sir.

X-Q. Did Lizza return the contract? A. He did. He eventually did, sir.

X-Q. Did he return it promptly? A. No, sir.

X-Q. After you got the contract back, which was around the end of August, sir, you then drew a third contract? A. Yes, sir.

X-Q. And you made some changes in that third contract? A. Yes, sir.

X-Q. Do you remember or recollect, sir, what the changes were? A. I remember one, sir. We left the riprap out. We left that item out completely. After some discussion, they didn't assent to it, but they told us they would try to sublet it to [67] another contractor, because it pertained to drainage. It was getting late in the season, very late, winter was coming on, and I thought maybe Lizza would—

Mr. Cain: I object to what he thought.

The Court: Yes.

A. [continuing] There was another change, sir. I put in there if Lizza did any work for us with his own crew he could only get paid unit prices for the work he completed.

X-Q. Was there a provision in there for losses caused by delay? A. There was and we struck that out.

X-Q. This third draft contract, sir, is dated July 27, 1955. A. Yes, sir.

X-Q. Was that the date that contract was drawn and delivered to Lizza? A. No, sir.

X-Q. What was the actual date that this contract was drawn? A. It was delivered around September 7th and drawn maybe the week before or two or three days before then.

X-Q. Around September 7th? A. Yes, sir.

X-Q. So the date of July 27th on that contract is not the date that the contract was drawn and delivered? A. No, sir.

X-Q. That is the final draft of contract you drew, is that right? A. Yes, sir.

[68] X-Q. Now when this contract was signed there was a provision in it, was there not, sir, that Lizza was to furnish the stone for the slope paving? A. That's right, sir.

X-Q. And that provision concerning the stone for the slope paving is the same provision that was in Contract No. 2, is that not right? A. That's right, sir.

X-Q. And the first time, sir, that you received any complaint concerning the stone was after you delivered this contract or submitted it to the Lizzas? A. Yes, sir.

X-Q. How long after you submitted that contract to Lizza, sir, did you receive a complaint about the stone for the slope paving? A. It was a long while, sir. The first contract was submitted—

X-Q. I'm talking about this contract. From the date you submitted this last contract, how long a period of time elapsed before you received any complaint as to the provisions of that contract? A. Not until I received the contract back.

X-Q. Do you remember when that was? A. It was around October 1st, the first part of October.

X-Q. Did you receive from Lizza, from the time you delivered that contract to them on or about September 7th until [69] October 4th, any complaints concerning the stone for the slope paving?

Mr. Cain: If your Honor please, he has asked this one over and over.

The Court: Well, I think he has put in different dates from time to time.

Mr. Solomon: I was comparing the No. 1 contract with the No. 2 contract. I am now comparing the No. 2 contract with the No. 3 contract.

The Court: All right.

Mr. Solomon: May I have the question?

The Court: You may.

X-Q. From the time you delivered this third draft contract to Lizza until about October 4th, did you ever receive any complaints, either oral or in writing, from Lizza? A. No, sir.

The Court: Gentlemen, this is a good time to stop. Let's go off the record a minute.

[Discussion off the record.]

[Whereupon at 4 p.m., the trial was recessed to Wednesday, December 12, 1956.]

[70] SECOND DAY

Federal Building, Boston, Mass.,
Wednesday, December 12, 1956.

RALPH D'ONFRO, Resumed

Mr. Solomon: Your Honor, I have no further questions of Mr. D'Onfro at this time.

Cross-examination

X-Q. [By Mr. Cain] Mr. D'Onfro, I show you a letter dated June 2 and ask you if that is a letter from your company to Lizza? A. Yes, sir.

X-Q. Will you read it, please?

Mr. Solomon: May we see it, please?

Mr. Cain: Yes [handing paper to Mr. Solomon].

A. Gentlemen:

Congratulations on the letting of yesterday.

The enclosed quotation confirms our telephone conversation of May 28, 1955. We will furnish performance bond and all other necessary insurance for our portion of the work. We are ready to move in any time you are ready. Very truly yours.

Mr. Cain: May this be marked, please?

[Letter, June 2, 1955, Daniel D'Onfro & Sons to Lizza & Sons, is marked as Defendants' Exhibit A.]

X-Q. Is it a fact that the only item on Exhibit 2, in addition to the items on Exhibit 1, is the painting and erection of structural steel? [71] A. That is right, sir.

X-Q. I show you this long sheet and ask you if you recognize what it is? A. I take it to be the list of prices which you folks did on the toll road. I would not know, however.

X-Q. Now, it says at the top, "Massachusetts Turnpike." It is a cut-off sheet, isn't it? A. Apparently.

X-Q. Obviously cut off on the right-hand edge. But it has a column headed "Lizza & Sons, Inc.," and would you examine it enough for you to determine whether it contains the items which you people bid for Lizza?

Mr. Corcoran: If your Honor please, I will object. The witness has said that he never had occasion to see this sheet.

The Court: I suppose technically you are right, in one sense. On the other hand, in some fashion or other-

Mr. Corcoran: If the question was whether the items shown on this sheet—whatever the sheet may be; I don't know—the prices are the same as in the bridge quote, but as to the sheet itself, and what it is—

The Court: I thought he was asking it in the form of an alternative. That is all I would be interested in.

Mr. Cain: Would you repeat the question, please?

[The last question is read by the reporter.]

[72] X-Q. Let me change that to this extent, Mr. D'Onfro: Would you examine it enough to tell us whether it contains at least some of the items which you bid to Lizza? A. Yes, sir. I recognize two or three of the items.

X-Q. I now go back to the second bid, which contains all the items in the first bid and one additional. That item additional was at some early point in your discussions with Lizza eliminated from your proposed contract, wasn't it? That item of painting and erection of structural steel? A. I believe so, sir, but I am not certain.

X-Q. Isn't it true that no contract was ever drafted by anybody that included that item, as far as you recall? A. I don't think so.

X-Q. Isn't it also true the item in these two sheets called Headwalls, coming to a total of $4,390, was also eliminated at an early stage? A. Yes, sir, I remember that.

X-Q. Now I call your attention to both of these sheets in connection with item C-21 and 22, 1,950 linear feet at $6.50? A. Yes, sir.

X-Q. Which purports to be multiplied out to $6,555. Is that amount correct? A. I believe it was called to my attention, sir, some time ago, that it was not right, and we corrected that item.

X-Q. The correct amount is twelve thousand something? [73] A. I believe so.

X-Q. And I call your attention to item C-20-4, aluminum 2 rail, 184 linear feet, and ask you if that is not incorrect? A. I would have to compare that. I don't know, sir.

X-Q. Is it not incorrect on both of those sheets? A. Well, it is 184 feet. I don't know what the correct amount is now.

X-Q. I show you Exhibit 14, which is the contract which you people drew, and ask you to find that item on it in order to be able to tell us whether the original bid was not

inaccurate at that point? A. That is right, it apparently was.

X-Q. The amount was 384 instead of 184? A. That is right.

The Court: What exhibit is that that has the inaccuracies?

Mr. Cain: Exhibits 1 and 2 are both inaccurate in those respects.

X-Q. Neither of those sheets contain a bid covering Class A, trench excavation, does it? A. That is right.

X-Q. Did you in some manner give Lizza a quotation as to that shortly after this ~~date?~~ A. No, sir.

X-Q. You mean by that that there was never any discussion at [74] any time, that you know of, of quoting $2 a cubic yard for Class A trench excavation? A. No, sir. That was a big item. We only got a small part of it.

X-Q. To the extent that you had a small part of it, did you not quote him $2 a cubic yard? A. No, sir, I did not quote on it. It never came up. I don't know what Class A applies to.

X-Q. You now say flatly that, to your knowledge, it never came out in discussion? A. That is right.

X-Q. Even though it appeared in the contract originally submitted to you? A. Well, not with me personally with anybody. I don't remember it.

X-Q. You read the contract originally submitted to you, didn't you? A. Yes, sir.

X-Q. It did have a paragraph of that item, didn't it? A. Yes, sir.

X-Q. Weren't you personally, once or more, in discussions about the form of that contract? A. Yes, sir.

X-Q. It did not come up? A. It may have, but I can't recall it.

X-Q. You can't recall anything about it? A. No. Class A did not bother me at all until long after that.

X-Q. When did it start bothering you? [75] A. Some time, sir—I can't remember when—it became apparent to me that the excavation for the structures was to be done as Class A trench. At that time I realized that there was some Class A trench involved in the contract.

X-Q. In your contract? A. Yes, sir.

X-Q. Didn't you have more to your answer? A. No.

X-Q. At any rate, about that time it started bothering you? Is that it? A. It became apparent to me, sir, that Class A trench—there was some Class A trench excavation in conjunction with my work.

X-Q. Don't you remember discussing it with somebody representing Lizza? A. No, sir, I do not.

X-Q. Eventually it was taken out altogether, wasn't it? A. Yes, sir.

X-Q. From the contract drafts? A. Yes, sir.

X-Q. But it did appear in at least one? A. Yes, sir.

X-Q. And you have no recollection about it being changed in any way before it was eventually eliminated? A. Well, before we drew the last contract, sir, the final contract that we all signed with Lizza. I thought that the [76] Class A trench was out at that time. I don't know how it got in, or when it got in. But it occurred to me that Mr. Lizza could go into our work and do the cream of the work, do all the Class A trench, and leave us the Class A trench excavation that had to be done by hand. I saw it was a terrible situation.

X-Q. So it bothered you in that sense? A. In that sense, yes, sir. At that time I decided it was a bad thing for Lizza to have in the contract, that he should do any of the Class A excavation.

X-Q. But you still, even now, do not remember discussing it with the Lizza people? A. No, sir I do not.

X-Q. Having in mind these various inaccuracies which we pointed out and items that were dropped, would you

please read down this sheet with me in order to determine whether or not that sheet indicates that the amounts bid by Lizza to the Turnpike on these items were identical with the amounts bid by you to Lizza? A. I will admit that. I admit, sir, that the prices we bid, the amounts we bid, were substantially the same thing that Lizza used on his contract.

X-Q. Do you not admit, since you go that far, that they are identical? A. I don't know that they are identical all the way down the list, but I know he used our prices—we found that out later.

[77] X-Q. Did you ever check in any way to determine for sure whether it is true that he did? A. No. It was not for us. It was not important for us to know what he did.

X-Q. So, while you now recognize in open court that they are close, you are not able to say that they are identical—is that right? A. No, I don't know. I don't know whether they are or not.

X-Q. Would you look at this sheet once again and tell us if it does not appear to you that that is a sheet covering the items and unit prices bid on the Lizza general contract? A. I don't know, sir. How could I say for sure? I think it is supposed to be.

X-Q. I asked you if it appeared to be that. A. I never saw a sheet like it before, but I take it that some of my items are in it. It says "Lizza & Sons" at the top, and then "Massachusetts Turnpike."

X-Q. Will you refer on it to Item A3-1, bridge excavation. Does it say 800 cubic yards, $5, $4,000? A. Yes, sir.

X-Q. Referring to C-5-1A, Class A concrete footings, does it say 1020 cubic yards, $25, $2,500? A. Yes, sir.

X-Q. Referring to C-5-1C, Class A concrete pier shafts, 627 cubic yards, 50, $21,350? [78] A. I believe it says $31,350.

X-Q. Then I show you the two exhibits Exhibit 1 and

Exhibit 2, which appear to be different as to that item, and I ask if Exhibit 2 is not inaccurate as to the amount of that item? A. There appears to be a mistake in multiplication.

X-Q. It is $31,350 on Exhibit 1, isn't it? A. Yes, sir.

X-Q. Referring to C-5-1B, Class A concrete abutments, does it say 1100 cubic yards at $48, $52,800? A. Yes, sir.

X-Q. Referring to C-5-1D, Class A concrete approach slab, 537 cubic yards, $25, $13,425. A. Yes, sir.

X-Q. C-15-1E, Class A concrete box culvert, 2,680 cubic yards, 48, $128,640? Have you got it? A. I have not got the figure, sir.

X-Q. C 5. A. What was the amount, sir?

X-Q. 2680 cubic yards, 48, $128,640? A. Yes, sir.

X-Q. C 5-4A, Class D bridge decks, 1,360 cubic yards, 60, $81,600? A. Yes, sir.

X-Q. C-5-4B concrete headwalls, 89 cubic yards at 60—have you got it? [79] A. Yes.

X-Q. $4,390? A. I do not have that, sir.

X-Q. You have 89 cubic yards at 60, multiplied out to $5,340. That would be a matter of computation, would it not—those figures being multiplied? A. The same as the rest of them.

X-Q. So that one or the other is inaccurate? A. Yes, sir.

X-Q. C-5-7, steel reinforcing bars, 953,600 pounds—do you have that? A. Yes, sir.

X-Q. Now, your bid on that for placing one was 2.50, coming to $23,840. What do you find on that sheet? A. Ten cents, coming to $95,360.—That is the reinforcing.

X-Q. That would include placing and furnishing of the steel? A. Plus freight.

X-Q. Yes. A. I presume so, and possible profit, and so forth.

X-Q. But I mean, it does include furnishing steel? A. Yes, sir

X-Q. C-10-1, dampproofing 2,440 cubic yards, 50 cents, $1,220. A. Yes, sir.

X-Q. C-17-3, 3,970 slope paving, 3,970 cubic yards at $4, $15,880. [80] A. Yes, sir.

X-Q. C-17-1, riprap, 3,990, $8, $31,920. A. Yes, sir.

X-Q. C-20-1 and 2, railing, 1,950 linear feet at $6.50 correctly multiplied out to $12,675? A. Yes, sir.

X-Q. C-20-4, aluminum 2 rail, 384 linear feet at $7.50, correctly multiplied out, apparently, to $2,880? A. Yes, sir.

X-Q. C-20-5, aluminum 1 rail, 100 linear feet at $6.90, $690? A. Yes, sir.

X-Q. E 3-9, bridge anchor assemblies, 16 at $25, $400? A. Yes, sir.

X-Q. So that in so far as Lizza bid the quantities and the items that you bid, it is identical with your bid, is it not? A. I presume so, yes, sir.

X-Q. Now, did you and anyone in behalf of Lizza discuss, before your bid was submitted, as to whether or not Lizza was planning to bid your bids? A. We did not.

X-Q. That did not come up? A. No, sir.

X-Q. You have no recollection of talking along that line with Mr. Marino? [81] A. No, sir.

X-Q. When did you first learn that Lizza's bids were practically the same as yours, if not exactly? A. My father attended the opening of the bids here in Boston, and when he came home he told us that Lizza was low bidder and apparently had used our prices.

X-Q. That being so, what can you tell us as to the usage in the trade as it would apply to some differential between what Lizza paid to you and what Lizza got from the Turnpike on your items? Is there a usage in the trade about that? A. What you are saying is, is it customary for contractors to put in a bid and to bid the subcontractors prices?

Mr. Cain: I am asking it another way.

The Court: No; he is saying just the reverse, as I understand the question. He is asking you whether, if a contractor wants to make a profit out of your bids, and doesn't make it himself by the over-all bid that he makes, whether he expects to get it out of you.

The Witness: All I can say, sir, is that in my case I have never done that with a contractor. I think it is all wrong. The whole business is wrong, extracting from a contractor after he has once bid.

X-Q. Do you think it is customary to have a difference in the two figures? A. That does not interest me. I have been in jobs where I had [82] contractors' prices, but I have given to them what they bid to me.

X-Q. Is your answer, you say, that it is not customary to have a difference?

The Court: He has not answered it at all.

A. I don't know, sir.

Mr. Cain: The Court says you have not answered it.

The Court: He now says he doesn't know.

X-Q. Is that your answer to the question as to whether it is customary? A. I don't think it is customary. To me it is definitely not, and if it is general I don't know. I doubt it

X-Q. It is customary, is it not, that the bond which the general contractor gives and pays a premium for must cover the items which are sublet? A. Yes, that is true.

X-Q. Is it not a substantial amount, then, the additional premium on Lizza's bond had to be by reason of the approximately $400,000 subcontract which you and Lizza were negotiating? A. He had to buy the bond for the entire job, yes, sir.

X-Q. His premium would be proportionately increased, would it not? A. I believe the premium is ¾ of one per cent on the whole job.

X-Q. A substantial amount? A. Yes, sir.

[83] X-Q. Is it not true that the general contractor has a great deal to do with the performance of the subcontract? A. Any case where he has, then he could put a price on his bid to cover the work.

X-Q. Is it not true that the general contractor must have a great deal to do with the subcontractor's performance?

The Court: How is that important?

Mr. Cain: What I am leading up to is to make it perfectly clear that there is a substantial expense.

The Court: It is perfectly obvious, and entirely irrelevant.

Mr. Cain: Very well.

X-Q. Your reference to a kickback, so-called, yesterday, discussed between you and Mr. Lizza and others, had no reference, I take it, Mr. D'Onfro, to anybody getting money for himself personally, in any of those discussions, did it? A. You mean, one man, for his own benefit?

X-Q. Yes. A. No, sir, I don't believe so.

X-Q. That was not even contemplated by anybody in any of these talks? A. No, sir, I don't believe so.

X-Q. Are you familiar with the various drafts of the contract? A. Yes, sir.

X-Q. Enough to be able to tell one from the other, do you think? [84] A. Yes, sir.

X-Q. I show you what purports to be an original letter from D'Onfro, and ask you if you recognize it? A. Yes, sir.

X-Q. We had in your testimony yesterday a conversation in an automobile going to Auburn, in which you were involved—is that right? A. Yes, sir.

X-Q. Also a conversation at the Bancroft Hotel, Worcester? A. The Bancroft Hotel was a social affair.

X-Q. Didn't you discuss the $8,000 item there? A. No, we did not discuss anything other than social, so far as I

can remember. We had a breakfast there, sir, to tell you one detail.

X-Q. No, I don't want to go into details, if you did not discuss it. Is it not true that some time in June the D'Onfro Company had agreed to accept the $8,000 proposition? A. Definitely not, sir. Definitely not.

X-Q. You say it did not come until later? A. No, sir. He talked about wanting some money, as I explained yesterday. At this Auburn meeting I asked him if he—

X-Q. Are you now answering the question? A. Well, I am saying, definitely not, the $8,000 was not discussed. He said he wanted some money. "Is there anything [85] in it for me?" he said. I said nothing.

Mr. Cain: I am offering this letter.

Mr. Solomon: O.K.

X-Q. Would you read it, please? A. [Reading]:

"Gentlemen

We have communicated with the concrete plants and the best quotation we have received is from the Berkshire Gravel, Inc., which we herewith enclose.

We are ready to execute the agreement you require in signing our sub-contract.

If you care to go over the items in detail we will be very glad to do so.".

[86] X-Q. This is a letter dated June 21? A. Yes, sir.

X-Q. You say definitely that that letter could not be interpreted to refer to the $8,000— A. How can it? We did not discuss it.

X-Q. Yes or no? A. No, sir.

X-Q. You had discussed it on the Auburn trip? A. No, we had not discussed any $8,000.

[Letter, June 23, 1955, Daniel D'Onfro & Sons to Lizza & Sons, is marked as Defendants' Exhibit B.]

X-Q. Would you say, then, that the next time the matter

of such a payment was discussed was in the meeting of July 13? A. Yes, sir.

X-Q. At Oyster Bay? A. Yes, sir.

X-Q. You were present? A. Yes, sir.

X-Q. And Mr. Cavello was present? A. Yes, sir.

X-Q. You know, don't you, that Mr. Cavello died shortly after that? A. I have been told that recently.

X-Q. Who else was there? A. Mr. Lizza came in later. There were two other gentlemen.

X-Q. You and your father were there? [87] A. My father and I were there.

X-Q. Mr. Gerber came in later, didn't he? A. I don't know, sir.

X-Q. You know Mr. Gerber by sight? A. I do now, sir.

X-Q. You don't remember his coming in? A. I don't remember. I don't remember meeting him at that time.

X-Q. Was the $8,000 matter discussed then and agreed to? Yes or no. A. No, sir. Yes and no. It was discussed; it was not agreed to.

X-Q. Being on the July 13 meeting now, various details of the contract were discussed and agreed to, weren't they? A. At this July 13 meeting various details of the contract were discussed?

X-Q. Yes. A. No, sir. I remember that meeting very definitely.

X-Q. What did you go down for? A. We went down to see if Lizza was going to give us this job or not. That was the first thing I asked, is Lizza going to give us this contract or isn't he.

X-Q. What did he tell you? A. I met Cavello and had some conversation with him.

X-Q. What did he tell you? A. He told me Lizza has to have some money, he has to have a kickback.

[88] X-Q. He did not use the word "kickback," did he?

A. That was the first time kickback had come into it, so far as I know.

X-Q. You mean it had not been discussed on the Auburn trip? A. No kickback. He had to have money. The word "kickback."

X-Q. That was the first time the word "kickback" was used? A. Yes, sir.

X-Q. So that he told you there had to be a payment? A. Yes, sir. Before we got the job.

X-Q. Did you also discuss other details of the contract? A. I don't know how to answer that question.

X-Q. You can answer it yes or no. A. There was no contract at that time.

X-Q. None had been drafted? A. There was none.

X-Q. Did you not discuss the terms of the draft, the contract to be drafted? A. No. We had no idea what the contract was going to be. We went down to see if we could get a contract.

The Court: I think you confused the witness by saying, did he discuss the contract, when there was not any contract.

Mr. Cain: Very likely.

X-Q. Having gone down to inquire whether you were going to get the job, and having learned that there would have to be a payment, were you informed, first, as to the amount of the [89] payment and, second, as to whether you were going to get the job? A. Cavello told me that he thought—I asked him how much of a payment Mr. Lizza would want, and he said he wanted at least a dollar a cubic yard for the 3,000 feet.

X-Q. That was clear enough, wasn't it? A. Yes.

X-Q. Anything else? A. Shall I go into details?

X-Q. Did you discuss the details of the proposed written contract? A. No.

X-Q. You did not? A. No, sir.

X-Q. You have no recollection, before you and your father left there, of Mr. Gerber coming in and having talk about a contract which he would draw? A. No, sir, he did not.

X-Q. You have no recollection of waiting with your father down there while Mr. Gerber went into his office? A. We did wait while Mr. Gerber was supposed to have been drawing a contract, and then decided to get the heck out of there before getting roped into something.

X-Q. It was also getting late, wasn't it? A. We wanted to get out.

[90] X-Q. So that you got out. It is a fact, then, that Mr. Gerber was drawing a contract while you were waiting, and you knew it—that is true, isn't it? A. I know this much: Lizza told some gentleman to prepare a contract for Mr. D'Onfro, and he was very anxious for me to wait. The only thing I know about this contract was that Lizza wanted me to wait.

X-Q. No other detail? A. No, sir.

X-Q. Did you or did you not agree at that time to a payment of $8,000? A. No, sir, we did not.

X-Q. You did not? You left without doing that? A. That is right, sir.

X-Q. At some time shortly after that you did agree to it, didn't you? A. We never agreed to a $8,000 payment, no, sir.

X-Q. You say you never so agreed? A. Without tying it in to something else.

X-Q. Be that as it may, you received within a few days in the mail a contract draft from the Lizza people, didn't you? A. Yes, sir, we did, sir.

X-Q. I ask you to look this one over carefully—it has not been introduced into evidence. I ask you, without reference to the notations on it, whether that is the draft which

shortly [91] after the July 13 meeting you received [handing document]? A. I think so, sir.

X-Q. You think it is? A. Yes, sir.

X-Q. Are you fairly sure it is?

Mr. Cain: Now, I offer this. Can it be clipped?

The Court: Was this received with the letter of July 25?

Mr. Cain: No, sir. The letter of July 19 went in yesterday.

Mr. Corcoran: No, I don't think it did.

Mr. Cain: Would you check that?

Will you mark this?

[Copy of contract dated July 1955, is marked as Defendants' Exhibit C.]

X-Q. I show you Exhibit 3 and ask you if this contract which you have just identified was not enclosed with that letter dated July 19? A. I think so, yes, sir.

X-Q. Now, following the receipt of that, a letter was written by D'Onfro to Lizza, which is Exhibit 5, and dated July 25—is that correct? A. Yes, sir.

X-Q. You are familiar with this letter? A. Yes, sir.

X-Q. And a meeting was arranged at which the letter was delivered [92] and discussed—to be delivered and to be discussed? A. I don't think a meeting was arranged. My father went on to New York.

X-Q. Who did go with your father, if you know? A. My brother and one of the men, I think, or the chauffeur down there.

X-Q. Do you remember the date when he went? A. The latter part of July.

Mr. Cain: May I see the letter of July 27?

Mr. Corcoran: I have not got it. I will agree that you may use a copy.

Mr. Cain: I will use my photostat.

Mr. Corcoran: O.K.

X-Q. I want to fix the date of that meeting at Oyster Bay to which your father went. I show you a letter dated July 27 and ask you if you are familiar with that? A. Well, I have seen it.

X-Q. Doesn't that refresh your memory as to the date that your father went down? A. It was possibly the day before.

X-Q. It is specifically referred to in this letter as the conversation on July 26, 1955, isn't it? A. Yes, sir.

X-Q. So that that is the date that it took place, is it not? A. Yes.

[93] Mr. Cain: I will offer this.

[Letter, dated July 27, 1955, Joseph F. Marino to Daniel D'Onfro's Sons, is marked as Defendants' Exhibit D.]

X-Q. Referring again to the letter which D'Onfro wrote to Lizza on July 25, Exhibit 5, I ask you to read it to yourself and tell us whether there is anything in there with reference to the $8,000 matter? A. It does not say so, but it is there.

X-Q. It is in there but it doesn't say so? Is that right? A. Yes.

X-Q. It is between the lines? A. Yes.

X-Q. This letter of July 25 was written by D'Onfro after D'Onfro had received the first draft of the contract, which has just gone into evidence? A. Yes, sir.

X-Q. And purports to be your objections to that draft, doesn't it? A. Yes, sir.

The Court: That is Exhibit C?

Mr. Cain: Yes.

The Court: At some time I hope somebody will tell me about Exhibit 4.

Mr. Cain: I believe that Exhibit 4—I am coming to it—is the second draft.

[94] The Court: I just want to get straightened out.

Mr. Cain: I think it is, your Honor. All counsel thought yesterday when that went in that that was draft No. 1. This is something we discovered over night.

Mr. Corcoran: We will agree to that; we thought we were putting in the first draft.

The Court: Fine.

Mr. Cain: Counsel have been looking for two drafts and had only come up with one up to yesterday.

The Court: So there is where I was given to understand that, because of this misunderstanding, Exhibit 4 was the first draft. I am now to understand that Exhibit 4 was the second draft?

Mr. Cain: Yes. We were all looking for two but never found it until last night.

X-Q. As a result of your father's conference, then, you received from Mr. Marino another draft which went in yesterday as Exhibit 4? I will show it to you. A. Yes, sir.

X-Q. That accompanied a letter dated July 27, which is Exhibit D, which states — well, you read that, will you please? A. [Reading]: "As per our conversation on July 26, 1955, concerning certain revisions to be made in the contract. Please be advised that certain corrections have been made as per agreement. Please sign all three copies, affix your company's seal and [95] attest. Mail all copies to our Oyster Bay office, attention Mr. E. Pelzer, and he will then mail to you one countersigned copy for your records. Give us this your valued attention immediately."

X-Q. Now, changes were made from No. 1 to No. 2, weren't they? A. I presume so.

X-Q. You remember that certain changes were made, don't you? A. The main changes were not made so that we disregarded this.

X-Q. Both contracts contained paragraph 4 dealing with Class A trench excavations, didn't they? A. I think so. This one does.

X-Q. With different verbiage. Both carried a unit price of $2 a cubic yard for Class A trench excavation, didn't they? A. Yes, sir.

X-Q. That is identified as Item A-3-2, and I ask you to look at the long sheet and see if that is the unit price on the sheet. A. Yes.

X-Q. Now, did you yourself study Exhibit 4 when it arrived? A. Just glanced at it. We objected to it.

X-Q. What did you object to? A. What it was at that time was that they still had us doing the riprap and slope paving, which we knew at that time to be a losing item.

X-Q. You objected to the riprap being in there at all—is that right? [96] A. We objected to either of them at this time, to both of them.

X-Q. Both what? A. We did not want either riprap or slope paving.

X-Q. Riprap or slope paving. What else did you object to? A. The letter is in evidence.

X-Q. You mean some letter which was written prior to the conference and prior to the drafting of Exhibit 4; you still objected to them as you got the new draft? A. The new draft did not have the objections in it—they did not take care of the objections.

X-Q. Are you saying they did not take care of any of the objections? A. Some of them, but the main ones they did not. The first objection we had was to the riprap and slope paving.

X-Q. Those are the two things which you still objected to?

The Court: Exhibit 3?

Mr. Cain: The letter is Exhibit 5, which lists the objections.

X-Q. We are listing now, Mr. D'Onfro, the things which you still object to in this No. 2 draft. You have named two of them. Are there any others? A. May I read it?

X-Q. Surely [handing paper]. A. The main ones I remember are the riprap and slope paving.

X-Q. Those are all you remember? [97] A. They had an item there in one of the contracts for construction staking, which I objected to.

X-Q. Did you still object to having Class A trench excavation in the contract? A. I don't know.

X-Q. You don't remember? A. No.

X-Q. You don't actually right now remember any objections at all other than riprap being in and slope paving being in? A. I know there were several smaller ones but those are the most important.

X-Q. Those are the most important? A. Yes, sir.

X-Q. Having those objections in mind, you asked your lawyer to draft another one, did you not? A. Yes.

X-Q. And he did so? A. Yes.

X-Q. And the one he drafted is Exhibit 8, dated August 3—is that right? A. Yes, sir.

X-Q. Having in mind that you have just told us that you wanted riprap out and slope paving out, I ask you if they are not in that contract drafted by your lawyer? [98] A. They are, with reservations, yes, sir.

X-Q. Reservations? A. Yes, sir.

X-Q. And the reservations are that the stone for the riprap be furnished by the contractor, and that the stone for the slope paving and the fine grading for the slope paving be furnished and done by the contractor—that is right, isn't it? A. That is right.

X-Q. Your father and all your brothers signed this contract? A. No, sir.

X-Q. Your father signed it? A. Yes, sir.

X-Q. On behalf of the partnership? A. He signed it, sir.

X-Q. It was sent to Lizza? A. Yes, sir. Sent or delivered; I don't know which.

X-Q. I would like to have you tell us in connection with

these two items, riprap and slope paving, whether or not the bids did not contemplate that D'Onfro would furnish the stones for both and do the fine grading on the slope paving? A. It did, but the bid covered—

X-Q. But those two items, there is no question about it, did contemplate that the subcontractor would do these things? A. That is right.

[99] X-Q. Now would you tell us, please, if you have some idea when these two bonds, Exhibits 6 and 7, were prepared? A. They apparently were around the 26th of July.

X-Q. Would you not say that it was either the 26th of July or thereafter? A. They were prepared?

X-Q. Yes. They are dated the 26th of July, aren't they? A. I would not be surprised if these were made up the 26th.

X-Q. The 26th was the day your father went to Oyster Bay. You remember the purchasing of these bonds and getting them out?

Mr. Corcoran: I object to the word "purchasing."

Mr. Cain: All right.

X-Q. The obtaining of these bonds? A. I remember there was an incident in regard to the acquiring of the bonds.

X-Q. You ordered them from the Woodcome agency? A. My brother went to get the first one and there was a mistake on it, he did not get enough money. He got $300,000, and I don't know whether it was the same day or the day after we discovered it was not enough for the job, so that they went back and got the second bond for $320,000.

X-Q. Both bonds are dated July 26 and both bonds refer to a contract between you and Lizza dated July 26? A. Yes, sir.

X-Q. Did you not believe at that time that you had a contract? [100] A. Definitely not, sir.

X-Q. You did not? A. Of course not.

X-Q. Do you have any recollection of an earlier bond than that in the sum of $600,000? A. No, sir.

X-Q. Obtained by you people and taken to Oyster Bay on July 26? A. I don't think that they would have given us a bond for $600,000.

X-Q. But you have no recollection of any such bond? A. No, sir.

X-Q. What was done with these bonds? A. They were returned somehow to the Woodcome agency.

X-Q. Did you show them to anybody for Lizza? A. I don't know. I did not. I don't know if anybody else did.

X-Q. You have no knowledge? A. No, I have not.

X-Q. Just that you had them, you got them, you had them and you took them back to Woodcome, and that is all you know? A. That is all I know.

X-Q. You don't know how long you had them? A. No, sir.

X-Q. Do you remember the obtaining of a bond for $392,610 from Woodcome? A. I have searched my brain, sir, and I can't remember that.

[101] X-Q. You have no memory of that? A. I have tried to but I don't remember. I know I must have. It went through my hands but I can't remember it.

X-Q. Have you any idea when you did it? A. No, sir, I do not.

X-Q. When you must have done it? A. I figure I must have done it on August 3 or August 2.

X-Q. That is deduced from the fact that the power of attorney is dated August 2? A. Yes, sir.

X-Q. You don't remember ever handling that bond in any way? A. No, sir. I was told I did, though.

X-Q. There is nothing of a tangible nature that you did or know about that bond that you have not told us up to this moment—is that right? A. That is right, sir.

X-Q. Did you receive at some time what they call a progress schedule as to the work to be done? A. Yes, we did.

X-Q. Do you remember about when you received that? A. I am trying to think.

X-Q. Was it early in this series of transactions, June or so? A. Not June. I don't think it was July. It may have been the middle of August or the first of August.

X-Q. Tell us in general terms what a progress schedule is. [102] A. A progress schedule is usually—somebody in the company usually draws a schedule of how the work is supposed to be coordinated, what part of the work to be done when.

X-Q. They do it in graph form, with dates at the top, type of work over at the left? A. Yes, that is one way.

X-Q. Is there anything on this one that makes the dates flexible? A. It says "Revised August 4."

X-Q. Can you read this to us to the extent of telling us what that progress schedule means as to the time that D'Onfro was to start work on this project? A. It shows the structure starting, according to this schedule, the 15th of November.

X-Q. October? A. October. And work stopping around the 20th of December, and then work resuming again March 15, and the work should be completed the following fall, August 15.

X-Q. August 15? On that structure, is there anything else on this that applies to D'Onfro? A. No, sir.

X-Q. Everything you did would be within the term of "Structure"? Everything you undertook to do would be within the term "Structure"—is that right? A. I guess it was in our mind to do this.

X-Q. That is the way you read it? [103] A. Yes.

Mr. Cain: I offer it.

[Progress schedule is marked as Defendants' Exhibit E.]

The Court: Is there a date on there or was that just the witness's guess as to when it was made?

Mr. Corcoran: It says "Revised August 4," doesn't it?

Mr. Cain: "Revised August 4."

X-Q. When you went down on July 13 to Oyster Bay, was the progress schedule shown to you then? A. It comes to my mind now that I think they were in the process of making one up at that meeting. I am not too sure.

X-Q. Did you see it, what they were making up? A. I could not say for sure.

X-Q. Did you have in mind the October 15 date then from any source? A. The October 15?

X-Q. Starting date. A. Date of completion?

X-Q. No, date of starting. A. I don't remember.

X-Q. You don't remember when you first had it in mind? A. No, I do not. We do not think much of progress schedules.

X-Q. You do not? A. No. I don't think Lizza does, either.

Mr. Cain: Have you a letter of August 23 from Marino [104] to D'Onfro?

Mr. Solomon: Again, do you want to use the copy?

Mr. Cain: Surely [handing paper to Mr. Solomon].

Mr. Solomon: O.K.

X-Q. I show you a letter dated August 23, from Mr. Marino to D'Onfro, and ask you to read it out loud. A. [Reading]: "Would you please present us at your earliest convenience a detailed schedule of operations for your contract work so that we can coordinate your schedule with the over-all progress of other contractors' work and the schedule for the entire job? Please give this your valued attention and consideration, and attend to this matter as soon as possible."

X-Q. Do you remember seeing that? A. Yes.

Mr. Cain: I offer this as an exhibit.

[Letter, August 23, 1955, from Joseph F. Marino to Daniel D'Onfro Sons, is marked as Defendants' Exhibit F.]

X-Q. That letter asked you to send Lizza a detailed progress schedule of your work, didn't it? A. Yes.

X-Q. Did you do it? A. I think my father did, sir.

X-Q. Is this the progress schedule which you sent? A. Yes, sir.

X-Q. Is that what is known as a detailed progress schedule? [105] A. I don't suppose it is detailed.

X-Q. Not very detailed? A. No, sir.

Mr. Solomon: May we see that? We have never seen it.

Mr. Cain: Excuse me [handing document].

X-Q. There is no formula in that that gives to us a date as to any of these things, is there? A. No, sir.

X-Q. It is not apparent to a layman? A. No, sir.

Mr. Cain: I offer it.

[Schedule of progress dated August 1, 1955, is marked as Defendants' Exhibit G.]

X-Q. I show you a letter dated August 26 from D'Onfro to Lizza. Do you remember that? A. Yes, sir, I do.

[Mr. Cain hands to Mr. Solomon.]

Mr. Solomon: All right.

X-Q. Will you read it, please? A. [Reading]: "Confirming my telephone conversation with you today. I have been advised by my attorney that my father's signature is not legal, therefore the contract must be returned for proper signatures. You do not have to return the bond. Kindly attend to this matter immediately so that we can order shipment of our truck crane and build the panels." [106] X-Q. You signed that yourself, "Ralph D'Onfro", didn't you? A. Yes, sir.

Mr. Cain: I offer it.

[Letter, August 26, 1955, Ralph D'Onfro to Lizza & Sons, is marked as Defendants' Exhibit H.]

X-Q. In that letter, Mr. D'Onfre, you referred to the bond, and that must have been the $392,610 bond. Does that letter refresh your recollection in connection with the Lizza people having the bond, and how long they had had it, or anything? A. No, sir.

X-Q. But there is not any doubt, is there, that at the time you wrote that letter you knew that they had possession of that bond? A. Apparently.

X-Q. That they were to keep it? A. That is what it says.

Mr. Cain: Is there an exhibit dated August 30 from D'Onfro to Lizza?

X-Q. I am showing you Exhibit 12 to see if you can help us as to what it means. This is a letter from D'Onfro to Lizza dated August 30: "We request your company to execute our subcontract agreement, including our letter of August 29, 1955, which we herewith deliver in person to your company at your Lee office August 30, 1955. We request the executed contract and letter be returned to us not later than September 3, 1955." Can you tell us what that means, "our subcontract [107] agreement, including our letter of August 29"? A. I don't know what the letter of August 29 is, sir, but we were at this time awaiting for the contract that my father had signed to be returned to us.

X-Q. The August 3 contract? A. Yes, sir.

X-Q. You think it is that draft that you are referring to there? A. No; I am just explaining to you. We were waiting for the draft to come back to us. In the meantime, so much time had gone by from August 3 or 4 until August 30 that we thought it was necessary to make a supplemental agreement, which my father made, and the supplemental agreement had a paragraph in it that if Lizza & Sons—

Mr. Solomon: Never mind about describing it for the moment.

X-Q. So that that is what you are talking about? A. Yes.

X-Q. Do you remember a delivery of it? A. Yes, sir.

X-Q. By you or anyone else? A. By my father, yes, sir.

X-Q. You have no personal knowledge of it, of the delivery? A. Yes, sir.

Mr. Solomon: I beg your pardon. Are we talking about the supplementary agreement yet?

[108] Mr. Cain: Yes.

The Witness: Yes.

X-Q. What you know is that your father left Leominster with it at some date around August 30—is that it? A. August 30.

X-Q. As to whether he ever did deliver it you don't know? A. I know he delivered it.

X-Q. You don't know of your own knowledge, do you? A. No.

X-Q. Now, you did not get back from Lizza either the August 3 contract or the so-called supplement over a period into September, did you? A. Yes; it was returned to us during the last of August or the first part of September.

X-Q. Unsigned? A. Unsigned by Lizza.

X-Q. In any way? A. That is right, yes, sir.

X-Q. But around September 7 you asked your attorney to draw a new one? A. Yes, we did.

X-Q. Do you have any explanation as to why it was dated as drafted—I mean, right in the typewriter? A. Yes.

X-Q. July 27, 1955? [109] A. I don't know why they back dated all those things.

X-Q. In this particular case you have no explanation for that? A. No, sir.

X-Q. This is the one that you all signed? A. Yes, sir.

X-Q. Did you go with your father to deliver it? A. No, sir.

X-Q. I show you a letter which has not gone into evidence, dated September 7, from Marino to D'Onfro, and

ask you to read that. A. [Reading]: "Gentlemen: Please return the three unsigned copies of contracts mailed to you by us. We are in receipt of the three signed copies of the contract delivered to us by hand by Mr. D'Onfro, Sr. Please give this your valued attention immediately."

X-Q. What do you say he was referring to when he said "three unsigned copies of the contracts mailed to you by us"? A. It must have been the first draft that we just found in the file.

X-Q. Or the second? A. It could be either, I suppose.

X-Q. You did not sign either one? A. No.

X-Q. So that that pinpoints the delivery by your father of the new contract dated July 27 at about September 7, doesn't it? A. The new contract you are referring to; the contract we all [110] signed?

X-Q. Yes. A. I don't know whether that was delivered or not. I don't know whether it was mailed or delivered.

X-Q. The letter refers to the delivery in hand by Mr. D'Onfro. It is the new one he is referring to, isn't it? A. Yes, it must be.

X-Q. There is no question about it, is there?

Mr. Cain: This is certainly an exhibit.

[Letter, September 7, 1955, Joseph F. Marino to Daniel D'Onfro & Sons is marked as Defendants' Exhibit I.]

X-Q. Take a look at Exhibit 15, a letter dated September 14 from Marino to D'Onfro and make sure that you know what is in it. Read the contents to yourself. A. Yes, sir.

X-Q. Here is an answer from Mr. Marino to your new contract, delivered on September 7, within seven days, about the riprap and the qualifications thereof, and the elimination thereof, and the slope paving and the qualifications thereof? A. Yes, sir.

X-Q. Do you remember testifying yesterday about a

much longer period than this going by before you heard anything from Lizza about those matters, following the delivery of the July 27 contract? Is that not so?

Mr. Solomon: That is not so.

[111] Mr. Corcoran: No.

Mr. Solomon: The lapse of time. I think you are referring to my cross-examination.

Mr. Cain: Yes, I am.

Mr. Solomon: It was the lapse of time that passed between the date after the second draft that he drew or sent to Lizza and the time that it was returned.

The Court: Which was the second draft?

Mr. Solomon: The second draft was August 3.

Mr. Cain: That was the first one. Did you not then, Mr. Solomon, go into another category and talk about a new lapse of time.

Mr. Solomon: I talked about the lapse of time between your second draft—now second draft—and our first draft. Then I talked about the lapse of time between the delivery of our first draft and the time that it was returned to us. That is my recollection.

The Court: My notes are not complete but they lean toward what Mr. Cain says.

Mr. Cain: My memory is that I objected and you pointed out that this was a new period of time.

Mr. Solomon: That is my recollection; I may be wrong.

X-Q. Anyway, it now appears, Mr. D'Onfro, that you get a seven day answer from the 7th to both of those letters, doesn't it?

The Court: That is Exhibit what?

[112] Mr. Cain: Exhibit 15.

X-Q. Since you did not attend the July 26 conference you cannot either confirm or deny what he says was talked about in this letter, can you? A. No, sir.

X-Q. Referring to Exhibit 17, another letter from Marino

dated September 23, it is reiterated that the unqualified position with reference to slope paving for bridges must be a part of the terms of the contract—that is true, isn't it?

Mr. Corcoran: The letter speaks for itself in this regard.

The Court: If it is true that the letter does say so.

Mr. Corcoran: I don't know that it does.

The Court: I do not, either.

Mr. Cain: I call your Honor's attention to this paragraph: "As far your last paragraph, we wish to advise you that this item C-17-3 as quoted by you cannot be sublet to anyone else. Your quotation for this item to be done for plan and specification will have to remain in your contract as originally quoted."

X-Q. I show you the letter from Lizza of September 27, Exhibit 18, and remind you that that is a request from Lizza to you to place all necessary material orders, and so forth, in connection with your work so that the work can be started without further delay. You testified yesterday, didn't you, that you just did [113] not do it? A. That is right.

X-Q. Going back to my last question, you did not get ready, after receiving the request on September 27,—for what reason? A. We had no contract at that time, sir.

X-Q. You had received, hadn't you, from the Lizza Company the return of the contract dated July 27, which all of you had signed, which Mr. Elia Lizza had signed, and which Mr. Elia Lizza, or somebody with his initials—E.L.—had initialed at one point, crossing out your qualification under slope paving for bridges? A. Yes, sir.

X-Q. You had had it back and you were holding it for the time being—isn't that true? A. As soon as we got it we drew a letter.

X-Q. Yes? A. We drew a letter up.

X-Q. Which is in evidence? A. Which I think is in evidence.

X-Q. Regardless of the exact date of it, your letter was answered by Mr. Marino, saying that your qualifications to slope paving for bridges must go out—that is true, isn't it? A. We sent this letter October 4—we received the contract back, as I recollect, October 3 or 4, and immediately my father and I drew this letter saying we would never concede taking out [114] of that paragraph pertaining to Lizza furnishing the stone, and we delivered that later in person to the Lee office.

X-Q. That is in evidence? A. Yes, sir.

X-Q. Then you received another letter following that from Mr. Marino, dated October 11, which is in evidence, reiterating that your qualifications must go out, didn't you?

Mr. Solomon: I object. Let the letter speak for itself.

Mr. Cain: I am leading up to something.

Mr. Solomon: I have no doubt of that.

X-Q. Is that the one you just looked at? It is like it, isn't it? Maybe not. I will show it to you. It is Exhibit 21, and it is from Mr. Marino. It says: "We are in receipt of your letter dated October 4, 1955. Please be advised that we are awaiting return of one copy of the executed contract. Our letter dated September 14, 1955, clearly states that this item C-17-3, slope paving for bridges, is to stay in the contract as quoted by you originally June 2, 1955. You will also recall that these item prices quoted by you were used by us in the bidding. We expect you to start work as soon as possible on the box culverts, which is vital to the progress of the rest of the job. Please contact our Mr. Thomas at our Lee office concerning the steel deliveries and schedules." You received that letter? [115] A. Yes, sir, I must have.

X-Q. And the very next thing that happened was that you did return at least one copy of the contract? A. I can't say we did return before or after this letter; I don't know.

X-Q. The letter of October 13 is in evidence. You sent it back with the letter of October 13, didn't you? This is my photostatic copy.

The Court: As I understand it, what he sent back was the contract that had the crossing out with Mr. Lizza's initials on it.

Mr. Cain: Yes, unchanged.

X-Q. You sent it back with this letter of October 13, Exhibit 22, didn't you? A. Yes.

X-Q. All you say in it is, "At your request we herewith return one copy of the contract." That is in response to the request in the letter of October 11, isn't it? A. It may be.

X-Q. Is there any doubt about that it is the request in the most recent letter which you are referring to? A. There are two letters involved. Are there two letters like this involved? Is there another letter earlier than this one here?

X-Q. There are other letters early in October. [116] A. Where we returned this contract? I don't know.

X-Q. It was either that one or one very much like it, wasn't it? A. Yes.

X-Q. I mean, that is what the letter says? A. Yes.

X-Q. I don't know whether I have asked you this, but if I have I will ask it again: The reason you did not comply with the earlier request to get ready for the work was that you had no contract—is that right? A. Yes.

X-Q. That was your only reason? A. Yes.

X-Q. Then it is not true that on October 19, by Exhibit 23, you wrote a letter to Lizza with reference to starting

the work? A. You must remember that there was something which led up to this.

X-Q. What happened between October 15 and October 19?

Mr. Corcoran: Do you mean, is this an exhibit?

Mr. Cain: This here.

Mr. Corcoran: Is that in?

Mr. Cain: Yes.

[Recess until 1:45 p.m.]

AFTERNOON SESSION

The Court: Mr. Cain, just before the recess you were asking this witness whether the provisions for riprap and [117] slope paving, as modified by Lizza in this so-called September 7 agreement, were not as they were in the original bid or bids, and the witness said yes, as I understand. You did not ask him, and I wish you would, whether the $8,000 that was pointed out to me yesterday was also in the original bid.

Mr. Cain: We will stipulate that it was not. It was no part of it.

The Court: You asked him if it was not the fact that what he was objecting to, what he refused to initial, that Mr. Lizza crossed out and initialed—if that had not put it, by crossing it out, back into the position it was in when he originally bid, and the witness said Lizza had put it the way it was in the original bid. And I was simply asking if there was not some change of the $8,000 that was bid or not bid, but at any rate, produced a total result which was different.

Mr. Cain: There was a question which was unanswered; would you give it to us?

[The last question in the morning session was read by the reporter as follows: "What happened between October 15 and October 19?"]

X-Q. Do you understand that question now? A. Yes. On October 16 I believe the Toll Road Authority called me up and asked me why I was not on the job, and I told him I had—"

[118] X-Q. The date, if possible. A. October 16, I believe. I told him I had contract difficulties, and he just told me that I better get busy, because the work was lagging, structures were lagging. I did not do anything about that, and on October 18 Mr. Robert Thomas called me and wanted me to get on the job. I told him I had contract difficulties. He said, "Don't worry about contract difficulties; get up here, get on the job." So on October 19 I went on the job. On October 19 I looked at the culvert.

Mr. Cain: This is no longer responsive.

The Court: It is repetitious, anyway, including your question.

X-Q. Is there anything that happened between September 27 and October 19 which you have not testified to, that happened to change the situation? A. No, sir.

X-Q. Now, on October 19 you actually did appear on the job? A. Yes, sir.

X-Q. By appearing on the job, who appeared? A. I did personally.

X-Q. You yourself? A. Yes, sir.

X-Q. Anyone else? A. No, sir.

X-Q. Also on October 19 this letter, Exhibit 23, went out? [119] A. Yes, sir.

X-Q. Also in the meantime you had proceeded to do the things that you did not do immediately on receipt of the September 27 letter, didn't you, to wit, place all necessary material orders, and so forth, in connection with your work, so that work can be started without delay? A. No, sir, I did not place any orders.

X-Q. You did not do that? A. No, sir.

X-Q. Even by the 19th? A. No, sir.

X-Q. Did you ever do it? A. No, sir.

X-Q. All that you did, then, up to the 19th, in the way of actually doing something to get going was to show up all by yourself on that day? A. Yes, sir.

X-Q. Did you stay there? Were you there on the 20th? A. Yes.

X-Q. Still just you? A. On the 20th—on the 19th I called my father and my father came up.

X-Q. So that it is just you and your father, nobody else? A. No, sir.

X-Q. Then you went back? [120] A. Yes, sir, I went back.

X-Q. I am not talking about conversations now; just what you actually did. A. Yes, I went back either that day or the next day.

X-Q. Came again on the 24th? A. Monday the 24th, yes, sir.

X-Q. This time with one crane and four men? A. Yes, sir, and some lumber.

X-Q. With some lumber? A. Yes, sir.

The Court: 10,000 feet of lumber.

X-Q. You remained there with those same four men and this equipment without adding to the equipment until the 27th? A. I believe I sent my men home the 26th, the day before I went home.

X-Q. You went home the 27th? A. I believe so.

X-Q. Your men did absolutely nothing while they were there, even to building forms or anything else? A. No, sir.

X-Q. They were men who were prepared, if you ordered them to, to do those things, building forms, building shafts, and so forth? A. Yes, sir.

X-Q. Did you learn at some time prior to the 27th that there had [121] to be or probably had to be a change which came from the Authority, which would probably prevent your getting started? A. Yes, sir.

X-Q. When did you find that out? A. The 26th.

X-Q. What did you find out as to that on the 26th? A. Well, Dick Downing was on the job.

X-Q. He was who? A. The resident engineer. I believe he got a crane in with a clamshell bucket and was digging those holes in the bottom of the proposed culvert, and I was down with him and he was very moody and he told me then he had had to call in a soil expert to determine what could be done to go ahead.

X-Q. Referring to the culvert, would you designate what culvert we are talking about? A. This culvert, namely, C-1.

X-Q. C-1? A. Yes.

X-Q. That is known as a box culvert? A. Yes.

X-Q. A box culvert is a reinforced concrete square, a very large culvert which conveys water. Will you describe it, please? A. This particular one, I believe, was 30 feet by 8 feet inside, and composed of walls two feet thick, and that carried a brook under the toll road.

[122] X-Q. Was it essential that box culvert C-1 be the first thing that you did on the job? A. I was led to believe that it was one of the first requirements of the Lizza people, yes.

X-Q. Do you happen to know whether it was possible to do anything else at that time? A. No, sir, it was not.

X-Q. It had to be box culvert C-1 or nothing? A. That is right.

X-Q. Had Mr. Downing issued orders, to your knowledge, that it must not start until these tests were made? A. No, sir, not as far as I know.

X-Q. Did you ever know of any actual official change order being issued which made necessary a delay as to that? A. All I know is that at that late day they had to call in a soil expert to make changes. I thought these changes were made a long time ago.

X-Q. That is what you thought. But actually they were

not. It was not possible because of this for you to proceed? A. No.

X-Q. Now, did you ever return to the job from the 27th to November 9? A. Yes, I did, sir.

X-Q. Just you yourself? A. My brother and myself, and my father was there on the 9th.

[123] X-Q. On the 9th?

The Court: The question was whether you went before the 9th, between October 27 and November 9.

The Witness: Yes, sir, we did. I don't remember the exact date, but prior to October 9—it was on a Sunday—I sent my brother Emanuel up to see if anything had been done.

X-Q. As far as you knew, none of your men were there other than Emanuel? A. No, sir.

X-Q. What did you do with the equipment, the crane and the lumber? A. Allowed them to stay there.

X-Q. They remained there until the 9th? A. Yes, sir.

X-Q. Then was there any correspondence that you know of between the 27th and the 9th—by the 9th I refer to your letter which I am going to bring up in a minute? A. Yes, sir.

X-Q. But prior to that was there any correspondence in connection with these delays? A. What was your first date?

X-Q. The 9th. Between the 27th and the 9th. A. None that I know of.

X-Q. You yourself signed this letter of November 9? A. Yes, sir.

X-Q. I will read it—I will read parts of it, not all of it. [124] This is a letter from D'Onfro to Lizza & Sons, the first paragraph of which is: "Since July 27, 1955, the date that the contract was executed between you and this company, Daniel D'Onfro Sons, we have been ready and willing to commence performance of that agreement rela-

tive to the construction of bridges and culverts on the job in Lee, Massachusetts. This we have been prevented from doing through no fault of our own and for reasons unknown to us but obviously known to you."

Later in the letter, referring to October 20, 1955: "On that day Mr. Thomas guaranteed to us, in the presence of the State Engineer, that we would definitely commence work on Monday, October 24, and as a result of this representation we moved all of our equipment and employees to the job site and were ready, willing and able to commence work on October 24."

Now, that is not quite true, is it? You did not move all your employees and equipment? A. All I needed for that culvert.

X-Q. All you needed was one crane and four men? A. Yes, sir, because I hired the rest of them through the local union.

The Court: I did not get the answer.

The Witness: I would hire the rest of the men from the local union.

X-Q. A succeeding paragraph: "Due to the long delay and exorbitant expense incurred by us, which delay and expense was [125] not caused by our own failure to perform the terms of the contract, we hereby notify you that we consider the contract breached and therefore void. We further notify you that we will not be in a position to do any work for you under the terms thereof."

This letter was delivered? A. Yes, sir.

X-Q. Where? A. To Oyster Bay.

X-Q. Were you on that trip? A. No, sir, I was not, sir.

X-Q. Who went, to your knowledge? A. Daniel and my brother Virgil.

X-Q. You were aware throughout these transactions, were you not, that the terms of the general contract be-

tween Lizza and the Authority were binding on you as a subcontractor? A. Yes, sir.

X-Q. You also knew, did you not, as a basic proposition, that any contract between you and Lizza would not come into effect until you were approved of as a subcontractor by the Authority? A. Yes, sir, he told me that.

X-Q. It was notification to that effect that you received for the first time on September 27, or by a phone call at about that same time? A. Yes, sir.

[126] X-Q. It was not known to you before that? A. What is that?

X-Q. That you had been approved as a subcontractor by the Authority? A. I did not know before that, no, sir.

X-Q. Did you ever in any way, on learning that you had been approved as a subcontractor by the Authority, indicate to anyone that there was no contract between you and Lizza which your company approved? A. Would you repeat the question?

[The last question is read by the reporter.]

A. Yes, sir, I indicated that. I indicated that to Mr. Lizza.

X-Q. When and where? A. I indicated that to Bob Thomas on the phone on the 18th. I indicated it—

X-Q. The 18th of October? A. Yes. It may have been on the 19th or 20th of October, in the Toll Road, in Dick Downing's office. And again the day I moved off—I think it was the 27th—I met Mr. Lizza himself in his yard and I indicated to him.

X-Q. But you did nothing of that nature between the 27th of September and the 18th of October when you went to Lee? A. No, sir.

Mr. Cain: That is all. Thank you.

The Court: May I see Exhibit 24?

[127] Mr. Cain: Yes [handing paper].

X-Q. [By the Court] Starting out with this first sen

tence of that letter of November 9, you say to Mr. Lizza, "Since July 27, 1955, the date the contract was executed between you and this company." What contract were you referring to in that letter, by that sentence? A. Sir, I don't know. I probably did not at the time, either, because I was very frustrated.

X-Q. You were frustrated, if I understand you correctly, because you did not have any contract? A. That is right, sir.

X-Q. In the light of that frustration, why did you write that you did have one? I should have thought that would be the last thing you would have written. A. I had not been on the job. It was my job to make money.

X-Q. But your frustration, as I understand it, was due to the fact, according to your present testimony, that you did not have any contract. A. That became secondary to me at the time, because I felt that the work was being delayed. Nothing was being done on the work on the 16th and 17th.

X-Q. If the work was going to be done, under what agreement was it going to be done? A. Under the agreement that I had sent to Mr. Lizza, that I had signed—all the boys had signed.

[128] X-Q. Mr. Lizza had not signed that agreement in that form, though, had he? A. No; without the cross-out, sir.

X-Q. You were very conscious of that, weren't you? A. Yes, I was.

The Court: That is all.

JOHN E. LUKENS, Sworn

Q. [By Mr. Corcoran?] What is your full name? A. John E. Lukens.

Q. Where do you live, Mr. Lukens? A. In Kensington, Connecticut.

Q. For what company do you work? A. Hartford Accident & Indemnity Company.

Q. In what department? A. Surety Department.

Q. In August of 1955 did you have occasion to go to Fitchburg, Massachusetts? A. I did.

Q. Do you remember the date? A. August 2, 1955.

Q. What was the occasion for your going to Fitchburg? A. To sign a bond covering a subcontract between D'Onfro and Lizza.

Q. Normally is this a job which you would have done here in Massachusetts? A. No. Our special agent in Massachusetts was on vacation at [129] the time.

Q. You went to the Paul J. Woodcome Insurance Agency at 417 Main Street, Fitchburg? A. Yes.

Q. Who did you see there? A. George McCue.

Q. Who is George McCue? A. One of the men that works in the agency.

Q. What happened after you arrived in relation to any contract? A. As I recall the circumstances now, the bond was completely drawn when I arrived. I signed it and attached my power of attorney to it.

Q. I call your attention to this bond and the signature at the bottom. Is that your signature? A. Yes, sir.

Q. Did you ever have occasion to sign any other contract bond in Fitchburg for the D'Onfros?

Mr. Cain: Other than this project?

Mr. Corcoran: Yes.

Mr. Cain: I pray your Honor's judgment.

The Court: I will take it.

A. Not to my knowledge. Not that I recall now.

Q. I ask you to look at the first page of this bond, and ask you whether or not you can recall whether that is the form of bond which you signed? [130] A. I am almost certain it is.

Mr. Corcoran: You have had this. Do you want to see it again before we mark it?

Mr. Cain: No.

Mr. Corcoran: I am going to offer this, your Honor.

[Contract bond, Hartford Accident & Indemnity Company to D'Onfro, dated July 26, 1955, is marked as Plaintiff's Exhibit 25.]

Q. Once you signed this bond, Mr. Lukens, what did you do with it? A. I left it with Mr. McCue, who was to deliver it to the D'Onfro people for signature and filing with the leases. [Lizzas.]

The Court: Mr. McCue—who is he?

Mr. Corcoran: He was one of the people in the agency there, at the Woodcome Agency. I have him here, your Honor. That is all, as far as I am concerned.

Cross-examination

X-Q. [By Mr. Cain] Mr. Lukens, it was August 2? A. Yes. I checked that on my expense account for the day. It was August 2.

X-Q. When you signed the first page of this, it was completely filled out just as we see it now? A. To the best of my recollection it was.

X-Q. All these D'Onfro names were typed in the place where they would normally sign? A. I am quite certain that part was filled out.

[131] X-Q. Did you say anything to Mr. McCue or anyone else present in reference to that fact? A. The way those names were typed out?

X-Q. Yes. A. You are asking me to remember what I said a year and a half ago.

The Court: The substance, not the words.

The Witness: I don't think I did.

X-Q. When you signed, was anyone else there except Mr. McCue? A. The girls in the office were there.

X-Q. No one of the D'Onfros or anyone acting for them? A. No, definitely not.

X-Q. You made no inquiry with reference to the amount of this bond of anybody, or the date of the contract to which it referred? A. I am quite certain that there must have been some conversation about the date of the contract.

X-Q. Between you and Mr. McCue? A. Between me and Mr. McCue, because a week previous to this time I had asked our special agent to go over and sign two bonds covering a possible contract for $300,000, and another possible contract for $320,000, with the understanding that either one of those bonds would be used, and I believe the contract date at that time was July 26. Now I have to assume a little bit—

X-Q. Let us not assume in response to my question. I am asking for [132] conversation with the only person who was there. A. Yes.

X-Q. In reference to this date and the amount. Have you told all that you remember? A. I think so. I just feel that—I am relatively certain that there was some conversation about the contract and the date of the contract, because it was dated the 26th, yet the bond was signed on August 2.

X-Q. The date of the bond itself is July 26? A. That is right.

X-Q. You mean you actually signed it on the 2nd? A. I actually signed it August 2. So that, although I am not assuming in response to your question, I would say that at that time I must have assumed that a contract dated the 26th had already been entered into, because this verbiage was already in the bond.

X-Q. That is what you assume? A. That is what I assume.

X-Q. Without ever having seen such a contract or found

out what the nature of that contract was? A. That is right, I never saw the contract.

X-Q. But you were aware that two lower bonds had been signed shortly before that? A. Yes, sir.

X-Q. Referring to the same date of a contract? [133] A. Yes, sir.

X-Q. In your conversation with Mr. McCue, at which time it was stated that he would deliver these to the D'Onfros with instruction for them to deliver it to Lizza. what, if anything, was said in respect to their signing it? A. I do not know if I made specific reference to Mr. McCue to have him be certain that the D'Onfros signed the bond.

X-Q. Is that something that you would assume that Mr. McCue would know about so that you would not have to tell him? A. I certainly would assume he would know about it.

X-Q. It is highly unusual, is it not, Mr. Lukens, to have a bond be delivered, as this was to be, to the Lizzas, without the principals signing it as well as the surety? A. It is unusual.

X-Q. Do you have any knowledge yourself as to what happened to this bond after that? A. No, I do not.

X-Q. By way of knowledge? A. I do not.

X-Q. Now, you are in the Hartford office, the home office in Hartford? A. Yes.

X-Q. Have you brought with you any application of indemnity between Hartford and the D'Onfros in connection with this bond? [134] A. Do you mean, have I brought it personally with me?

X-Q. Today, yes. A. I have not, no.

X-Q. Do you know of the existence of such instruments? A. An application for the bond which is signed by the D'Onfros?

X-Q. Yes. A. Yes, I do.

X-Q. Do you know of the existence in the Hartford

office of the Indemnity, between Hartford and D'Onfro, indemnifying Hartford for possible losses under this bond? A. That is a part of our application.

X-Q. It is in the application? A. Yes.

X-Q. Have you actually seen it? A. Yes, I have.

X-Q. Is it signed? A. I believe it is.

Mr. Corcoran: Wait a minute. I can help on this. I have agreed definitely that I would put this in [handing document to Mr. Cain]. I agreed to it the first morning we were here.

The Court: Yes.

Mr. Cain: You mean you agreed that there was such?

The Court: He agreed to produce it.

Mr. Corcoran: If it will help any, I will agree that this is the application in connection with his bond and let [135] it go in.

X-Q. So that this is the one and only application and indemnity combination instrument which you have in connection with this whole subcontract with the D'Onfros and Lizza, as far as you know? A. As far as I know, it is.

The Court: Do you mean by that there was no separate application or indemnity agreement for the other two bonds in the lesser amount?

The Witness: I do not believe an application was signed on the two bonds in the lesser amounts.

X-Q. Now I show you a place under No. 5 on the first page of this contract bond; something has been xed out, which appears to be $300,000. A. That is what it appears to be.

X-Q. Over that is typed $392,610. Do you know about that? A. I have not seen this for some time. Apparently what happened is that this application was originally made out for $300,000, and then when it was determined that the contract price was to be different it was changed.

X-Q. Do you know what steps were taken to make sure

that whoever signed this authorized such a change? A. No, sir, I do not.

X-Q. Were you present when it was signed? A. No, sir, I was not.

[136] X-Q. Do you know how it happened to be dated July 26, or whether it was actually signed on July 26? A. No, I do not.

X-Q. Could you identify the person who made this change? Do you know who that would be? A. No, there is no way for me to know that.

X-Q. Is it likely that this bond was made out in Fitchburg, at the Woodcome office, and sent to Hartford from there? A. It is very likely.

X-Q. That would be the original? A. That is the original.

X-Q. If it went down there in its original form, it would not have been changed by anybody in Hartford without hearing from somebody in Massachusetts?

Mr. Corcoran: There is so much conjecture here I don't see how it can be helpful.

The Court: That is a little bit too conjectural.

X-Q. Anyway, it is likely that instructions to do so came from the Woodcome Agency?

The Court: It is the same question.

Mr. Cain: I offer this.

[Application for contract is marked as Defendants' Exhibit J.]

Mr. Corcoran: Thank you, Mr. Lukens.

[137] GEORGE H. MCCUE, Sworn

Q. [By Mr. Corcoran] What is your name? A. George H. McCue.

Q. Where do you live, Mr. McCue? A. 175 Pine Street, Fitchburg, Mass.

Q. What is your business? A. I am a broker, producer for the Paul J. Woodcome Insurance Agency, Inc.

Q. That is the insurance agency which has been mentioned in testimony recently? A. That is right.

Q. Do you recall the occasion that Mr. Lukens has testified to there in Fitchburg? A. I do.

Q. You were present, were you? A. I was.

Q. Take it from the time that you had this first—let me point out Plaintiff's Exhibit 25, and I ask you whether or not you recognize this as being the bond that Mr. Lukens was talking about? A. I do.

Q. As a matter of fact, you had occasion to look at it this morning, did you? A. I did.

Q. Do you recall hearing Mr. Lukens say that he turned the [138] bond over to you? A. I do.

Q. Can you remember any conversation at the time this was turned over? A. Relative only to the bond?

Q. Yes, relative only to the bond? A. No other conversation than would normally be the course in any bond. Just there is my power of attorney. As John pointed out, "There is the completed bond; now it is up to you to deliver it."

Q. What did you do after you and John—Mr. Lukens—parted company? A. I took this bond to the home of Mr. D'Onfro, entered through a side door and, as I now recall, handed it to Ralph, pointed out that it should be signed, that all the boys were not present—the boys here mentioned on the bond, Daniel A., Ralph, Emanuel, Virgil and Nicholas. I think that there were two boys present. I don't recall the other boys. To brother Ralph, I said, "You will all have to sign this because of the way it is set up," and I left it with him, and that is the extent of my conversation.

Mr. Corcoran: That is all as far as I am concerned.

Mr. Cain: No questions.

ROBERT H. THOMAS, Sworn

Q. [By Mr. Corcoran] What is your name? [139] A. Robert H. Thomas.

Q. Where do you live, Mr. Thomas? A. East Dugway Road, Lenox, Mass.

Q. What do you do for a living, Mr. Thomas? A. Civil Engineer.

Q. What is your training? A. Bachelor of Science, Civil Engineering, University of Pittsburgh.

Q. At some time were you employed by Lizza & Sons, Inc., one of the defendants in this case? A. Yes, sir.

Q. When were you first employed by Lizza, if you remember? A. June 22, 1955.

Q. What was your assignment when you were first employed by Mr. Lizza? A. I was in the Oyster Bay office working with the estimators.

Q. Was there any particular job that was assigned to you at that time? A. Not at that time, no, sir.

Q. When was the first time that you had any contract with any of the D'Onfros, if you can recall? Can you recall the very first? A. It would have been in July, 1955.

Q. Now then, can you recall any occasion in July of 1955 when—you know Mr. Ralph D'Onfro? [140] A. Yes, sir.

Q. Did you know his father? A. Yes, sir.

Q. Did you know his mother? A. No, sir.

Q. Can you recall an occasion in July, 1955, when Daniel and Ralph D'Onfro visited the Oyster Bay office of your employer, Lizza & Sons? A. Yes, sir.

Q. If you know, do you know whether or not a Mr. Cavello was there? A. Yes, sir.

Q. What was Mr. Cavello's first name? A. Antonio.

Q. Did you have occasion to discuss the proposed work that the D'Onfros were to do in the Lee-Becket job that

has been the subject of this hearing? A. We discussed it around the office, yes, sir.

Q. Was there any discussion that you played any part in as between Mr. Cavello and Mr. Ralph D'Onfro? A. Not as a direct participant of a discussion, no.

Q. Did you hear any conversation between the two? A. Yes, sir.

Q. Will you tell the Court what that conversation was?

Mr. Cain: This is July 13?.

[141] Q. Would July 13 be the date of this? A. I care not to—

Q. Would you say it was the middle of July? A. It was after the 4th of July—that I know positively.

The Court: Whatever the date was, it is limited to the first meeting that you had?

The Witness: Yes, sir.

Q. Was that the first meeting that you had with these people? A. Yes, sir. Will you repeat your question, please?

The Court: The conversation you had with Cavello and D'Onfro about the work.

The Witness: There had been—first of all, I will have to preface this by stating that I was not a participant of that discussion, and my knowledge of it—I hesitate to use the expression—was eavesdropping. There were discussions relative to the contract, the contemplated items that D'Onfro & Sons would do for Lizza & Sons on this particular contract. I was desirous that there would be some reduction in total cost, looking at it as Lizza being prime and having a set-up with D'Onfro. It was common knowledge that there would—

Mr. Cain: I object to it.

The Court: Were the words common knowledge a part of the conversation?

The Witness: No.

The Court: Just tell us the conversation.

[142] The Witness: There was a need expressed that there would have to be a reduction in total prices or total cost.

Q. Were any figures discussed? A. The figure that was most prevalent was the $8,000.

Q. To your knowledge did the D'Onfros agree to this $8,000? A. I have no knowledge that they did agree, no, sir.

Q. You don't know whether they did or did not—is that true? A. No, sir.

The Court: Did you hear them say anything about it, plus or minus, so to speak, in favor or against?

The Witness: No, sir, I do not recall.

The Court: You just remember that there was a talk but the D'Onfros did not express their reaction?

The Witness: Not that I can recall at this time, no, sir.

Q. When did the D'Onfros leave, by the way, if you can recall? You do not recall that? A. No, sir.

Q. Did you have any discussion with either Mr. Lizza or Mr. Cavello on this business of $8,000 after they left? A. Tony and I, yes.

Q. What was the discussion with Mr. Cavello? A. We talked in general terms along with Johnnie Cox.

Q. Who is Johnnie Cox? A. He is another person that worked in the engineering room. [143] He also did estimating.

Mr. Cain: You are to tell conversation between Cavello and yourself.

The Witness: He included Johnnie Cox.

Mr. Cain: I object.

The Court: Excluded.

Q. When was the next time that you had any contact with the D'Onfros?

The Court: There was some talk about conversation with Mr. Lizza, according to this.

Q. I don't understand it. Did you have some talk with Mr. Lizza after this? A. No, sir.

The Court: Only with Mr. Cavello?

The Witness: Mr. Cavello, yes.

The Court: The D'Onfros.

Q. At some time did you go to the job site—that is, the Lee-Becket job? A. Yes, sir, I was transferred from Oyster Bay to the Lee-Becket job on August 6 or August 8—I don't recall which one it was.

Q. What was your particlar job on this 4-1/2 miles of road? A. Project engineer.

Q. What does a project engineer do? A. You have got, of course, charge of the engineering work, the [144] scheduling of materials, the acquisition of certain materials relative to the job, the keeping track of your estimate moneys, preparing your estimates. Basically it is a scheduling job. As Mr. Marino stated, it was a part of my job to attempt to coordinate the sub-contractors into one unit.

Q. Have you testified when you did go to the job site? A. On August 8, I believe, was the first day on the job. I left Oyster Bay, as I recall, on Friday, August 6.

Q. Having once gotten there, what was your first contact with any of the D'Onfros, if you remember? A. Datewise, I believe they were—Ralph or his father, or and his father, it seems to me were into our office at various times. The first actual job contact, if you can call it that, that I had with them was when it was necessary for us to have him come in and start his work.

Q. I show you plaintiffs' Exhibit 20, which is a letter from Ralph D'Onfro to Lizza & Sons, addressed to J. F. Marino, and ask whether or not you ever saw the original of that letter? A. Yes, sir.

Q. When did you receive that letter? A. It is addressed to our Lee, Mass. office. If my memory serves me cor-

rectly, Mr. D'Onfro delivered this. I would say Mr. D'Onfro delivered this.

Q. Were you in communication with Mr. Marino in regard to this letter? [145] A. We were in practically daily communication with Mr. Marino the whole time.

Q. In regard to this letter, were you in contact with him concerning it? A. We would have called him on anything that appeared to be of an important nature—we would call Joe or Oyster Bay almost immediately.

Q. That was your invariable practice, was it? A. Yes, sir, it was.

Q. This letter, in the second paragraph, provides "Some modification was made in the slope paving item by crossing out furnishing stone and grading; we want this item to remain as it was or eliminated entirely from the agreement." Did you bring that to the attention of Mr. Marino? A. In all probability we would have read any accompanying letters to him by phone.

Q. Now then, having in mind that that letter is dated October 4, did you at some time during the middle of October have occasion to call Ralph D'Onfro with regard to appearing on the job site? A. Yes, sir, we did.

Q. Do you happen to know the date of that? A. Other than the fact that it was very close to the middle of October. I don't recall datewise. We had received our steel and we were at a point where we could get going.

Q. What steel are you talking about? [146] A. Reinforcing steel for culverts.

Q. Reinforcing steel for culverts? A. Yes, sir.

Q. You are not talking about structural steel for the bridges, are you? A. No, sir.

Q. What occasioned your telephone call to Ralph D'Onfro at this time? A. Other than the fact that the culvert site would be made available, the steel was there; we were being pushed by the Authority. Everything, as far as I

was concerned, was ready and we were at the stage where he could begin work.

Q. I take it you were in constant contact with the Turnpike Authority. Did they have an office there? A. Yes, we were in daily contact with their representatives.

Q. You say one of the reasons was that they were after you to get going on this particular part of the job? A. There were few times went by that we saw them that they did not ask us what the status of it was. In other words, they were constantly inquiring of us when we would get started.

Q. When you say started, are you now referring to that work that you expected D'Onfro to do? A. Yes, sir.

Q. In response to that telephone call did Ralph D'Onfro appear in Lee? [147] A. Yes, sir, he did.

Q. In reference to the day that you called him, how soon after did he appear? A. If I remember correctly, he said that he would be up the following day, the day following the call, and I have no reason to believe that he was not there the day following the call.

Q. When and where did you meet with Ralph D'Onfro on the day following your telephone call? A. He came first to the office, as far as I know. We discussed the areas in which we had work, where we could work, visited the culvert site, arranged a meeting with the section engineer for the following day or the day thereafter, went over the tight points, and so forth.

Q. The next day, in keeping with the arrangement which you made, did you meet with some representative of the Authority? A. Yes, sir, we met in Dick Downing's office.

Q. Who was Dick Downing? A. The resident engineer for Brown & Blauvelt.

Q. At that time, during the course of this meeting, the particular job that you expected the D'Onfros to do was discussed? A. Yes, sir.

Q. Now, during the course of that discussion was there any mention of contract difficulties? A. Yes, sir, there was. [148] Q. Who said what concerning these contract difficulties? A. In the presence of Dick Downing and along with one or two of his representatives, Ralph kept mentioning each time work was suggested—Ralph kept mentioning that he was having some contractual difficulties.

Mr. Cain: Just conversation, if we may have it.

The Court: That is what I understood.

The Witness: He mentioned in our discussion that he was having contractual difficulties with Lizza, which I tried several times to close out immediately, because his difficulties with Mr. Lizza were not a part of the relationship between the Authority and Lizza.

The Court: You say you tried to close it out. I don't know what you mean by that. Do you mean you tried to stop him talking or tried to bring out the difficulties?

The Witness: I had no authority to straighten out the difficulties.

The Court: What do you mean?

The Witness: To stop the discussion, because it had nothing to do with the Authority. The difficulties were with us, not with the Authority.

Q. Will you tell us any other discussion that you had at the meeting at that time? A. We discussed the starting date. Ralph D'Onfro assured us at the time that he would be back Monday morning to start the work. [149] We had other points that were discussed relative to his starting work on Monday morning, but it was agreed that he would be back Monday morning with his force to start work.

Q. You were anxious, were you, to get him on the job as soon as possible? A. Yes, sir.

Q. Did you indicate to him in any way that you felt that, as far as the contractual difficulties were concerned, that

hey might be straightened out? A. My concern was getting—

The Court: It is not a question what you were concerned with. What did you say, if anything?

The Witness: I did make the statement, yes, sir, that the difficulties could be straightened out; the important thing was for him to get to work.

Q. At some time did you observe that Mr. D'Onfro showed up on the job with some men and equipment? A. Yes, sir.

Q. Would that be possibly the following Monday after that conversation? Does that sound right to you? A. Yes, sir.

Q. What did he bring to the dam site, if you know? A. He had a crane and a quantity of form lumber, various size form lumber. I believe that was all that I can recall now.

The Court: Did he have any men?

[150] The Witness: Yes, sir, he had some men with him. Numerically I don't know.

Q. Men that he had brought from the eastern part of the state? A. I assumed they were D'Onfro employees from this end, yes, sir.

Q. Was there anything for him to do the first day that he got up there? A. He did some stake-out work on the culvert site, yes, sir. That is, he personally did it.

Q. How long was he up there with his men and equipment before he sent his men home, if you can recall. A. They went back the same week they arrived.

Q. They were there a matter of several days? A. Yes, sir.

Q. During that period of time did you at any time observe those men that you have described doing any work for him up there? A. No, sir.

Q. During the number of days, whatever it may be, that

he was up there, was there any work that he could have done? A. Yes, sir.

Q. Ralph's father Daniel was up there, was he not, on the occasion when Ralph came up to have this talk with the Turnpike Authority—do you recall that? A. I don't recall that he was there, no, sir.

Q. Was there anybody else that you know of from the D'Onfro organization there except Ralph? [151] A. Not to my memory, no, sir.

Q. There was testimony this morning concerning the custom in regard to letting contracts. Is that a subject with which you are familiar, at all? A. I have been exposed to that, yes, sir.

Q. What do you mean, exposed to it? A. I have been working for contractors, engineers, for seven years.

Q. Whether or not it is customary for an engineer to use the prices quoted in a subbid and then in turn negotiating with the subcontractor, attempting to lower him? Is that the custom as you know it? A. Will you repeat that, please?

[The last question is read by the reporter.]

Mr. Cain: I object.

The Court: What is your objection?

Mr. Cain: It has nothing to do with what happened here, as far as prices are concerned.

The Court: That is interesting. I must be working under a misapprehension.

Mr. Cain: I think there is a distinction between lowering specific prices—

The Court: Do you understand the question?

The Witness: Could I hear it repeated again?

The Court: Let me rephrase it. Do you know whether [152] there is a custom that a general contractor, in submitting his bid to the Authority, if he uses as part of that bid the actual figures which have been submitted to him

as bids by proposed subcontractors, and his bid is thereafter accepted by the Authority then when he comes to make the actual negotiation or contract with the proposed subcontractor, for him to say to the subcontractor, "I have used your exact bids, and therefore I want to make an agreement with you for a total amount which is less"? The question is, is there such a custom?

The Witness: I would say that if you are desirous of receiving a reduction in the subcontractor's bid to you, that the practice would be to cut that bid prior to the time that you submitted your bid, and show those prices to your sub in an effort to get him to meet those prices.

The Court: In other words, what you would try to do is to get him to cut his bid to you before you submitted—you being the general—before you submitted your bid?

The Witness: No, sir, after.

The Court: Then I misunderstood you.

The Witness: What it would amount to would be, if you were desirous of reducing a sub's bid to you—in other words, you want to—

The Court: At what stage?

The Witness: After you get the job.

[153] The Court: All right.

The Witness: What you would do would be to reduce the prices that you put into your bid; in other words, the prices that you submitted as your proposal. Now you would take the extent of that reduction and put that in unrelated items.

The Court: Now I am all confused. If your proposal has already been accepted, how can you reduce it?

The Witness: No. You of course have your sub prices before you enter your bid. You reduce those sub prices for your proposal.

The Court: You mean your proposal to whom?

The Witness: To the potential client.

The Court: I don't know who that is. The Authority in other words?

The Witness: In this case the Authority, yes, sir.

The Court: But I thought you had already submitted a bid to the Authority on your hypothetical situation and it had been accepted. Why would you reduce it after that?

The Witness: You can't afterwards, of course.

The Court: You would not want to, would you, if it had been accepted?

The Witness: No.

The Court: Let us start over again.

The Witness: In the preparation of your bid as a proposed general, you would get from potential subs prices. [154] you would—

The Court: That is step number one?

The Witness: Step one, yes, sir. You have your sub prices. You would try to reduce the sub prices. In other words, if a sub bids to you $25 a yard, you would try to reduce that to about $22 a yard.

The Court: Where would you reduce it?

The Witness: In your bid to the Authority. You would take that $3 a yard and put that money in an unrelated item, an item that perhaps you are going to do yourself.

The Court: You mean to include it in your general bid?

The Witness: That is right. But in items aside from the subcontractor items. You then submit that to the Authority. Because of course your total value of that contract is not changed in dollars and cents.

The Court: It is not changed because you have not submitted it yet.

The Witness: It is submitted, and immediately, we will say, lo, your sub had bid you $25 a yard. The sub gives you a quotation of $25 a yard.

The Court: In your original bid you put in $25?

The Witness: No. You put in $23.

The Court: In your very original bid?

The Witness: Yes.

[155] The Court: Then you have got the $3 somewhere else. You have got the $3 so that you put it somewhere else?

The Witness: That is right. But then, after you are low bidder you can go back to your potential client and say, "I could not get $25, I could only get $23; do you want the job at $23?"

The Court: In other words, you would fool him by not letting him know that you had included this somewhere else?

The Witness: I would not say it was fooling.

The Court: He is aware of that fact?

The Witness: Yes.

Mr. Corcoran: We are talking about custom.

The Court: Yes. He is a general contractor, anyway.

Mr. Corcoran: That is right.

The Court: I have not yet heard the answer to this question. The question that was put to you was, where the sub has given to you as the general a $25 bid and you used the $25 in your bid to the Authority, would it then be the custom under that hpothetical set of circumstances to go back to the sub and say, "Look, I put you in at $25, but I am only going to pay you $23"?

The Witness: No, sir.

The Court: I will take a short recess at this time. First, may I say with respect to your motion to amend which was filed yesterday, Mr. Corcoran, in line with the testimony [156] I have heard I will allow that motion, but I will allow any other amendments that any other party feels to be necessary.

[Short recess.]

Cross-examination

X-Q. [By Mr. Cain] Are you employed by Lizza & Sons now? A. No, sir.

X-Q. When was your employment with them severed? A. April 13.

X-Q. 1956? A. Yes, sir.

X-Q. Have you ever yourself estimated a road contract job? A. Not I as an individual, completely alone, no, sir.

X-Q. Have you ever had charge of it? A. No, sir.

X-Q. Have you ever negotiated a contract between a sub and a general contractor following the granting of the contract to the general? A. Not solely responsible, no, sir.

X-Q. As you say, you have just been exposed to this to some degree? A. Yes, sir.

X-Q. Do I understand you to testify that it is customary, following the use of identical bids—you understand what I mean by identical? A. Yes, sir. You mean the general at the same price.

[157] X-Q. Yes. For the general then to get together with the sub and make specific changes in his bid rather than to make a blanket change in the total figure that he will be paid? A. I did not make that statement.

X-Q. You don't think you said it? A. No, sir.

The Court: I did not understand it.

X-Q. Did you not say, taking as an example a bid of $25 a cubic yard made by the sub and followed exactly by the general, that you would then get together with the sub and if possible reduce the sub's bid to $22, and the same type of thing with other items in his bid to you? A. No, sir, I did not say that.

X-Q. Then I am sorry; you will have to help me, because I thought you did.

The Court: I did not think he did, either, if that will help you.

X-Q. That would be one possible way of doing it, wouldn't it? A. Yes, it would be possible.

X-Q. But it is not customary—is that right? A. Yes. You are prefacing all this on identical bids.

X-Q. Yes. All my questions, at least up to now, and I understood the Court's questions, are predicated on the hypothetical situation of following identical bids in both steps. You so understand it, don't you? [158] A. I understand your question.

X-Q. Now will you put in your own words, please, in the hope that I can understand it, what the custom is, having that situation having taken place? A. I dare say that there is no hard and fast rule that you could adhere to and say that this is done in 51 per cent of the time, and therefore it is the custom. You might do a bit of horse trading on it.

X-Q. And do it various ways? A. Yes.

X-Q. But I would like, since I have not apparently got it straight—I would like to have you tell us again, if you will, what you testified the custom was in direct, or when the Court asked you the question. A. I am not entirely certain that the question was discussed, what to do when they are the same. Am I incorrect on that?

X-Q. You are as far as I am concerned but I will ask you now if your answer was not based upon a situation where identical bids were used in the two steps? A. I would say if identical bids were used that that is the way it is going to wind up; that is, if you do not tack on or subtract from it, that your sub has a job at his prices.

X-Q. You now say that it is not a custom of the trade to negotiate a lower total of sub bids than the sub bids themselves add up to? [159] A. You are working in there a lot of intangibles.

X-Q. I am talking about custom. A. Let me put it this

way: There is always the opportunity for horse trading, yes.

X-Q. In various ways? A. Yes, sir.

X-Q. Many of which are customary? A. Well, if you get too many, none are customary.

X-Q. There are a few, anyway, customary practices in this connection, are there not? A. Well, I don't like the term customary. To me customary defines a large percentage, or connotes a large percentage. What one contractor will do is not necessarily what another contractor would do under the same circumstances.

X-Q. So that when you testified on direct as to the custom, you were referring to a practice which is done a large percentage of the time? A. When it is desired to reduce the sub, yes, sir.

Mr. Cain: Exactly.

The Court: I don't understand it. He has said several things, and I don't know which one you have in your mind or which one he has in his mind.

X-Q. Do you have the Court's question, the question the Court asked and which you answered at the end of the direct examination — do you have that in mind? [160] A. Could you repeat that question?

X-Q. I don't know as we can get it way back there. If you don't have it in mind we will pass on. A. Please pass on, then.

X-Q. In the course of your work in November, 1955, on the job site at Lee, did you have occasion to make a report of the events which happened in connection with D'Onfro from the time of your arrival in Lee in early October, 1955, to the time when D'Onfro left the job on October 27? A. I will correct that. I did not arrive in Lee in early October; I arrived in Lee early in August.

X-Q. Did you have occasion to make such a report for

the period from the early part of October until October 27? A. Yes, sir.

X-Q. I show you a communication which is dated November 12, 1955, and apparently signed by you, and ask you if that is it? A. Yes, sir.

X-Q. Now do you recall the contents of that? A. Yes.

X-Q. In a general way? A. In a general way, yes, sir.

X-Q. Will you read it, please, to yourself, then? A. In its entirety?

X-Q. Yes, please, and tell us if you now so testify. A. [A pause.] Yes, sir.

[161] Mr. Cain: I offer it.

Mr. Corcoran: I object to this, if your Honor please. If he has any questions bearing on our direct examination to ask—

The Court: I don't know whether this does or does not. If it does, I will take it. If it is something new I will not take it.

Mr. Cain: It covers the period of events.

You had better read it and see what you think [handing document to Mr. Corcoran].

Mr. Corcoran: If your Honor please, I still think that there are things in here that are not touched upon, and the better approach would be to ask the questions and get a ruling.

Mr. Cain: I thought I was saving time. May I make this witness my own for the purpose of whatever material there may be in it?

The Court: What do you say?

Mr. Corcoran: It is all right, as far as I am concerned, your Honor.

X-Q. Then you do so testify as to all the items in this report? A. Well, I wrote it, yes, sir, if that is what you mean.

X-Q. My question is, do you now state it under oath? A. Yes, yes.

Mr. Cain: I offer it.

[Report by Robert H. Thomas, dated November 12, 1955, is marked as Defendants' Exhibit K.]

[162] Mr. Cain: No further questions.

Cross-examination by Mr. Solomon

X-Q. Mr. Thomas, as I recollect, in direct examination you indicated that on or about the middle of October you saw Ralph D'Onfro—is that right, sir? A. Yes.

X-Q. And he came to Lee as a result of a telephone conversation with you? A. Yes, sir.

X-Q. As I recollect, sir, you indicated to the Court that you did not remember talking to Daniel D'Onfro? A. This is the occasion of his visit when we went to the Authority's representative?

X-Q. That is right. A. That is right, sir.

X-Q. I ask you to look at this letter and tell the Court whether or not it refreshes your recollection as to whether or not at about that time you did have a discussion with Mr. Daniel D'Onfro. May I call your attention to page 1 of this letter? A. Yes, Mr. D'Onfro was on the job on several occasions.

X-Q. Is there anything in this letter which would refresh your recollection as to about when he came up on the job? A. It so states that on October 20, 1955, Messrs. Ralph and Daniel D'Onfro arrived on the job.

X-Q. Wasn't that the day after you and Ralph D'Onfro talked to [163] Dick Downing, the Authority's engineer? A. No, sir; I think that was October 20, I believe was the date we talked with Mr. Downing.

X-Q. So that Daniel D'Onfro was there at that time? A. Yes, sir.

X-Q. So that when you testified that he was not there,

in direct examination, is it not a fair statement that you are possibly mistaken? A. Yes, sir.

X-Q. On page 1 of this report of yours, I ask you to read paragraph 2. Read it out loud, will you? A. [Reading]: "Between my arrival in Lee, Mass., and the early part of October, 1955, Messrs. Ralph and Daniel D'Onfro appeared on the job on several occasions. Each time they arrived they would inquire as to the status of their contract with Lizza and Sons, and if we had received any word from the Authority as to its approval of them as our subcontractor. I believe that on one occasion you were present when they were here. Each time they were assured by this office that they would be informed of any and all progress on matters pertaining to their operations." Q. Now I call your attention to the statement which you make in this paragraph, wherein you state that "Ralph and Daniel D'Onfro appeared on the job on several occasions; each time they arrived they would inquire as to the status of their contract with Lizza & Sons." [164] Does that statement refresh your recollection with reference to the conversations that you had with both Ralph and Daniel concerning their contract? A. There was the sore item—

X-Q. My question is, does it refresh your recollection? A. Yes, sir.

X-Q. What is your recollection, sir, with reference to the conversation you had with Ralph and Daniel which related to the status of their contract? A. They felt that—

Mr. Corcoran: I pray your Honor's judgment.

X-Q. What did they say? A. They explained their difficulties with that particular item in the contract, or this document.

X-Q. What was that, if you recollect? A. Slope paving.

X-Q. Did they explain to you or tell you what difficulties they were having with reference to slope paving? A. There

seemed to be a dispute as to what would be included as a part of that work.

X-Q. Did they go into any detail with you? A. We had discussions relative to the supplying of the stone for that slope paving.

X-Q. In other words, did you gather from your conversation with the D'Onfros, both Ralph and Daniel, that they were in [165] difficulties in their contract relationship with Lizza & Sons, more especially pertaining to the stone for the slope paving?

Mr. Cain: I object to that.

The Court: What he gathered I will not take.

X-Q. What did they say specifically, as you remember it, with reference to their differences concerning slope paving? A. They felt that the stone for the slope paving had to be furnished to them for that item.

X-Q. When you wrote this letter of report, which was directed to Lizza & Sons, of November 12, 1955, you were cognizant of that situation? A. Yes, sir.

Mr. Solomon: That is all.

Mr. Corcoran: That is all, as far as I am concerned.

Mr. Cain: I have no further questions.

Mr. Corcoran: The plaintiff has no further witnesses at this time.

The Court: Does that mean that you rest or that you are temporarily out of stuff?

Mr. Corcoran: I think I am temporarily out of gas. I had expected someone else here.

Mr. Cain: I will not require that he rest.

The Court: Does that mean that you would like to continue until tomorrow morning?

Mr. Corcoran: Not I. If the Court wants to go ahead [166] now that is all right as far as I am concerned.

Mr. Cain: It depends upon how long you want to sit.

The Court: That is up to counsel. I would like to finish

tomorrow. I am perfectly willing to go ahead out of order.

Mr. Cain: I would like to put Ralph on for one or two questions.

RALPH D. D'ONFRO, Recalled

Q. [By Mr. Cain] This morning, Mr. D'Onfro —

Mr. Corcoran: I am confused. Is he your witness now?

Mr. Cain: Yes, I am putting him on.

Q. This morning you seemed to have no recollection of what happened to the bond? A. That is right, sir.

Q. You have now heard testimony from Mr. McCue that he brought this bond to your house, came in the side door or something, and you were there, did you not? A. I heard it, yes, sir.

Q. It still does not bring it back? A. No, sir, it does not. It may very well be but I can't remember it.

Q. Then his testimony does not help you any more than you were helped this morning to tell us what happened to the bond from August 2, or whatever time it got into the hands of Lizza? A. No, sir, I don't know how it got there.

[167] Mr. Cain: That is all.

The Court: I would like to ask a question myself. May I see the application?

I show you Exhibit J, Mr. D'Onfro. Is one of those signatures yours?

The Witness: Yes, sir, it is.

The Court: Do you have any recollection about signing that, the circumstances?

The Witness: No, sir, I do not.

Q. Are these the signatures of your brothers and your father? A. Yes, they are.

The Court: You can't help us on the date or anything—the date that you signed it?

The Witness: No, sir, I could not.
The Court: Thank you.

JOSEPH F. MARINO, Sworn

Q. [By Mr. Cain] What is your full name? A. Joseph Marino.

Q. Where do you live? A. 5624 12th Avenue, Brooklyn, New York.

Q. Are you employed by Lizza & Sons? A. I am.

Q. In what capacity? A. Project manager.

Q. How long have you been employed by Lizza? [168] A. Approximately 2-1/2 years.

Q. Have you been project manager throughout that period? A. Yes, sir.

Q. What are the duties of project manager? A. The duties of project manager are to manage the jobs, coordinate all jobs, negotiations with all subcontractors, see that progress and the sequence of operations all work, and all the rest of it.

Q. That is, you do not just manager one project at any one time; you mean by that that you manage all the projects, or more than one that Lizza may have going at any one time? A. More than one.

Q. In connection with that work are you authorized to negotiate contracts with subcontractors? A. I am.

Q. Are you familiar with the custom of the trade in connection with the negotiations with subcontractors following the acceptance of the general bid? A. Yes.

Q. Were you personally in communication with any of the D'Onfro brothers, or Mr. D'Onfro, Sr., prior to June 1 in connection with the bidding of this case? A. By telephone, yes, sir.

Q. With whom? A. It was Mr. D'Onfro, Sr.

[169] Q. Will you tell us the conversation, that conver-

sation? A. The conversation at that time was that we were shooting for this job and we would like the best prices that they could manage.

Q. Was there anything said between you and him as to whether or not you would use their identical bids in your bidding? A. At that conversation?

Q. Yes. A. No.

Q. Was there another occasion when that was discussed between you and any of the D'Onfros prior to June 1? A. Not prior to that.

Q. Given a situation in the trade where the general contractor in his bid uses the identical prices the subcontractor gave to him, is there a custom in reference to the lessening of the total amount ultimately paid by the general contractor to the subcontractor? A. Frankly, I have never known of the custom. I mean, there is all types of what we call shopping, and that is one of them.

Q. What is shopping? A. We have our price and other contractors have theirs, and it is a shopping deal. The only time that it really holds on one is when prior to that you execute an agreement that they will give you a certain price, and that if we receive the job that will bind us to them on those particular prices. [170] Then there is all kinds of trading done. Other contractors, after the award, will call you up and submit probably lower prices than whoever gave you the previous ones. Lots of subcontractors will not quote sometime before, they will quote you afterwards, and they will beat you, perhaps, or you might beat them. So that there is no real custom.

Q. In June and July, 1955, where was your office? A. Well, in June and July it was anywhere I went,—Boston, Cape May, New Jersey, Oyster Bay and other points.

Q. Did you ever maintain an office at Oyster Bay? A. At Oyster Bay and at Cape May, New Jersey.

Q. Was there an occasion when Daniel D'Onfro, Sr. and you met in your office at Oyster Bay to discuss the terms of Exhibit 2? A. Yes, sir. It was in July.

Q. Do you recall such a meeting on July 26 between you and Daniel? A. Yes, sir.

Q. At that time had there been submitted to him a draft of a contract? A. One draft had been submitted already.

Q. Was there anybody else in this conference besides you and Daniel? A. No, sir. Nobody else was allowed in.

Q. Did Daniel bring with him on that occasion a letter dated [171] July 25, which had gone in as an exhibit? Can you answer that without seeing it? A. Yes, he did.

Q. I show you Exhibit 5 and ask you if that is the letter? A. Yes, sir, it is.

Q. Were the notations that appear on this letter, notations made during that conference? A. Yes, sir.

Q. Were some of them made by you and some of them made by Daniel? A. Yes, sir.

Q. Did he bring with him the draft which had previously been sent to him? A. The previous draft?

Q. Yes. I show you that.

The Court: You do not need to see it. Did he have any draft of any agreement with him that you saw?

The Witness: Yes, sir, he had a copy.

Q. And you made notations on that, too? A. Yes, sir.

Q. Is this it? A. Yes, sir, that is it.

Q. Now, did he also bring with him on that occasion a bond? A. He showed me a bond.

Q. Did he take it back with him? A. Yes, sir.

[172] Q. Did he take it back with him? A. Yes, sir. He would not give it to me.

Q. Will you describe that bond to the best of your ability? A. It was a bond in the approximate amount of $600,000, and he said there was a mistake made and it was in excess of what was needed.

Q. He said? A. He said. I agreed with him at the time that there was no necessity of paying for a bond of that size in connection with that case. But he never gave it to me to keep for him, or anybody else. He was going to bring it back and have another bond made up.

The Court: What company was that?

The Witness: If I recall correctly, it was the same company that was represented on the surety.

Q. It was the Hartford? A. The Hartford, because he held it in his hand all the time.

Q. Do you recall any reference in it to a contract? A. At that time?

Q. Yes. Well, that was in reference to this first draft that was sent out.

Q. In what way did it refer to it? A. In the contract it did not specifically state; it just was a contract between Lizza & Sons.

[173] Q. Have you any recollection of the date that it gave? A. No, I have not.

Q. Is there anything else about it that you do remember? A. No. It was just the size of the bond that he discussed—that was about it.

Q. Who made the notation against Paragraph 2, "Blanket Order for"? A. That is my writing.

Q. Will you explain that? A. "Blanket Order for"—this item in particular, No. 2, on Class A trench excavation. The way it originally was would involve the entire item of Class A trench excavation. I made the notation there, because the entire item was not involved in this work.

Q. The entire item was the general contract? A. General contract, Class A trench excavation. I explained it thoroughly to Mr. D'Onfro.

Q. I show you this previous draft, Paragraph 4. Do you say that you understand that to mean that it covers the

entire— A. The way it reads, to do any portion of the item, which would be the entire item.

Q. So what did you say and what did he say about the changes in that paragraph of the contract? A. I explained to him that on all structural work it is the general practice that the amount involved and the area involved would be in exact items, and no others.

[174] Q. Referring to paragraph 1 of this letter, it reads, "Because you are doing all rock excavation we do not want the riprap or the slope paving." What was said about that? A. When I explained that to him, as far as he was concerned, he quoted us firm prices on the complete item in its entirety, as per plans and specifications, and we could not allow it.

Q. Who wrote the letters "O.K."? A. That is Mr. D'Onfro's, I believe, writing, in the ink.

Q. Then there is the word "No" after the "No. 2." A. He had written originally that he did not want any part of that item, before we discussed it.

Q. Do you know what the word "No" means in connection with your conversation? A. That was before.

Q. He had written that before? A. That was before.

Q. What about the O.K.? A. That is the same thing, because we had gone into those items very thoroughly.

Q. What do you mean, you had gone into them? A. I said we had in the conversation, so that he understood.

Q. Coming to No. 3; what are the notations, and what was the conversation? A. The notation here is—I wrote on the side of it, "To provide access," on the paragraph 3. You see he has it crossed [175] out over here, that he did not want any part of it.

The Court: You will have to keep your voice up.

The Witness: I am sorry, sir. I wrote on the side, "To provide access," on paragraph 3.

Q. Are you familiar enough with this to find the Access

paragraph? [A pause.] You do not find it? A. That may have been one of the areas he would have liked.

Q. But you do remember the talk? A. Yes.

Q. Tell us. A. He had stated that before the excavation could be begun, before some of the clearing could be done, the peat excavation we had run into, it would be impossible for him to get his machines and his men into those areas to do work, and after he got through talking about it I felt that it was a part of the work we should do, to provide him with that access.

Q. Then you made a notation against the third paragraph that same day, "Provide access"? A. That is right.

Q. Is that yours? A. That is mine.

Q. Paragraph No. 4: "Under item 2 in your contract we do not assume any liability for delays not caused by us." What was the talk about that? A. He explained to me the fact that he may be delayed by other [176] work, other contractors, and he did not want to feel responsible for penalties which may be imposed due to these delays, so that I wrote on the side of it, "Reword" that paragraph.

Q. Did you accept his suggestions about it? A. Yes, I thought it was all right.

Q. No. 5: "Under Article 6 in your contract, Article 34 in the Standard Specifications states that the engineer for the Massachusetts Turnpike will furnish the staking of the locations for the bridge and box culverts." What was the talk about that? A. He explained to me that he did not want the responsibility to do the entire engineering, that under the terms of the specifications the engineers provided the control points. After we discussed it thoroughly I agreed with him and had that rewritten.

Q. Paragraph 6: "Under Item 8 of your contract, because in all cases the Lizza Company will necessarily be on the job site first, they should obtain necessary permits,

property agreements and releases." What was said about that? A. We had gone over that thoroughly, too, and I explained to him the fact that the releases on the property that he may rent—which is the only thing involved in there, is off the right of way—that on property he may rent that he must obtain releases from these people that he is renting this property from, and to get the necessary permit to do any other work that [177] he wanted outside the right of way, for his convenience, to prosecute his contract. Those are the releases I meant. And in doing so he understood that thoroughly, and I think the contract explains it.

Q. No. 7: "Under Article 11 of your contract, we will set the anchor bolts for the structural steel if the Lizza Company allows us $5 per set or our cost, whichever being least." What was done about that? A. This is a normal thing that is done when the bridge contractor is not setting the structural steel. We supply the anchor bolts, and when they are setting up forms they just put them in the location and pour the concrete around and they are set.

Q. Did you and he reach an agreement on that? A. On this particular thing, yes. Because I explained that if necessary, if the anchor bolts were not set, I would drill for the anchor bolts at a later date.

Q. In the lower left-hand section of this sheet there is the notation, "Riprap dumped at location." Whose notation is that? A. That was mine.

Q. Will you explain it? A. It concerned the riprap and all the rock that was going to be necessary for the riprap and the slope paving. We had approximately 300,000 cubic yards of rock to excavate and remove and place in the embankment. I told Mr. D'Onfro that [178] he would be very welcome to any of the rock he wanted whatsoever at any location he was ready for, all he had

to do was to notify us at the time, that he was welcome to the stone.

Q. What was said in reference to putting such a thing into the contract? A. I would not allow it because he quoted me an item complete in its entirety, and if he was not ready before the completion of the job and I was through with my rock, there would be no rock available, and I would not go out and buy the rock for him on the item he quoted me.

Q. Is that what you said to him? A. Yes, sir.

Q. Now in the course of this conference did the matter of $8,000 come up for discussion? A. That had been all settled prior to this conversation.

Mr. Cain: I will ask you that later.

The Court: I think we will strike that out. It is a conclusion anyway.

Mr. Cain: Yes.

Q. First, was it discussed at all this time? A. No, it was not, because this is his list here, and it is not mentioned anywhere, and it was not mentioned.

Q. He did not mention it and you did not mention it? A. No, sir.

Q. Now, notations are made also on Exhibit C. Were they made [179] at that time? A. Yes, I wrote them.

Q. Paragraph by paragraph, on the first page, there are four notations. Were those made by you? A. Yes.

Q. What is the notation? A. This contract would be superseded by another.

Q. At the end of paragraph 2 there is the word "Add." What is the meaning of that? A. At the end of paragraph 2 the word "Add," to add on more that Mr. D'Onfro and I agreed on

Q. On what subject? A. I do not recall. This is the point where I added on paragraph 2, "The subcontractor specifically agrees to conform to the provisions which pro-

vide for the progress and time of the completion of the contract, with this exception, that the subcontractor will not be responsible for delays not caused by him."

Q. Paragraph 3 is O.K. Paragraph 4 is—what about that? A. Paragraph 4. When I wrote it out that concerned the Class A trench excavation. I rewrote it that "The contractor agrees to pay the subcontractor $2 per cubic yard for Class A trench excavation, this Class A trench excavation to be done only in the areas pertaining to items as listed above, and to no other part of the Class A trench excavation item."

[180] Q. Paragraph 5 is O.K.? A. Yes.

Q. 6 and 7 were discussed for changes? A. Yes. Paragraph 6 was rewritten as follows:

"The Section Engineers will provide control survey, which includes the furnishing and setting of control stakes and bench marks for lines and grades, the staking of the location of all piers, abutments or bridge structures, together with anchor bolts and bearing surfaces and the location of all culverts and other drainage structures. The Subcontractor agrees that he will be responsible for these stakes and will protect and maintain these stakes and replace any stakes that have been moved, destroyed or knocked out at his own expense. The Subcontractor further agrees that he shall furnish and set from the control stakes and bench marks at his own expense and with his own engineers all remaining stakes required for the construction operations pertaining to every phase of the items listed above and he shall be solely responsible for the accuracy of his own work."

Q. Is No. 7 the one where you gave them access? A. I said, "The contractor agrees to provide access to the Bridge Sites for the Subcontractor."

Q. Eliminating all of the previous seven? A. Yes.

Q. Was 8 changed? [180a] A. 8 was.

Q. What was the talk about that? A. That was the talk on the obtaining of their promised probably agreements referred to in this letter, so after the explanation that was the result.

Q. Would there be any changes in 9, 10, 11, 12? First, 9, 10 and 11? A. Not that I recall.

Q. 12 is the $8000? A. Yes.

Q. Do you still say that it just did not come up? A. No, because it was not in this letter that he brought to me. The copy of the contract contained it, and the rewritten contract contained it.

Mr. Solomon: I ask that the last part of that answer go out.

[181] The Court: It may.

Q. Was there any discussion about 13? A. No, there was not.

Q. 13 is the same? A. That is the same.

Q. That is the $8,000 item. What is 12? A. That is the method of payment.

Q. No change there? A. No, sir.

Q. No change in the balance of the contract? A. None.

Q. How long did this conference go? A. Oh, a couple of hours, at least.

Q. After you had discussed all these things with him, did he say anything to you that he was not willing to go along with what you had said to him? A. No, he said nothing whatsoever.

Q. Following that conference did you either then or the following day draw a new contract? A. I did.

Q. And mailed it to him? A. I did.

Q. Is that Exhibit 4? A. It is.

Q Without any exception? A. With no exceptions.

[182] Q. Now, do you have any recollection as to the bond or bonds coming to you following, or coming to you or

being shown to you following this drafting of Exhibit 4 by you? A. No, I do not.

Q. Had you ever seen before yesterday the two bonds, the $300,000 and the $320,000 bonds? A. I never saw them, never heard of them.

Q. Did the $392,610 bond come to your personal attention after that? A. It never did.

Q. In September or some time did you apply to the Authority for approval of D'Onfro as a subcontractor? A. After the discussion Mr. D'Onfro and I had we were in agreement—

Mr. Corcoran: I object, if your Honor please.

Q. The question, is did you apply for approval of him by the Authority? A. Yes. I ordered Mr. Cavello to submit Mr. D'Onfro as a subcontractor to the Massachusetts Turnpike Authority.

Q. Do you remember the approximate time of that? A. It was a few days after the meeting Mr. D'Onfro and I had.

Q. Is there a communication in our possession that you know of? A. Yes, there is.

Q. Taking that step? [183] A. Yes.

Q. Anyway, your recollection is that it was shortly after this date? A. Yes.

Q. Coming up to the period in October, were you on the job at Lee at any time that the D'Onfros were there in October? A. Yes, sir. I met Mr. Daniel D'Onfro and Mr. Ralph D'Onfro on the job.

Q. Do you remember the date of that? A. I do not recall the date.

Q. Will you tell us the conversation? A. The discussion was on the work and when it would be ready for operation. That was the main discussion of the contract. Then we also had a discussion brought up to me once about the slope paving.

Mr. Corcoran: May we have the date a little closer? Was it in October?

Mr. Cain: In October. He doesn't know the date.

Q. It was at Lee? A. At Lee.

Q. Go ahead. A. In our trailer office. The discussion came up on the slope paving, and I still maintained the stand that the price they submitted in the original quotation was the price that would remain and work must be done.

[184] Q. What did he say? A. Well, they would like us, of course, to furnish the stone, and I still maintained that while we were doing the rock operation any stone that was needed I would gladly give them right on the job.

Q. I show you a copy of a letter from Lizza & Sons dated August 1 to Brown & Blauvelt and ask you what it is. A. This is the original submission on August 1 of D'Onfro to the Massachusetts Turnpike Authority on all their items for approval as subcontractors on the Lee, Massachusetts, job.

Mr. Corcoran: Do you plan to bind us with a letter from Mr. Marino to Brown & Blauvelt?

The Court: You are in this situation, — that he has already testified that they did not.

Mr. Corcoran: He testified that he did it as far as the body of the thing is concerned.

The Court: I will uphold you as far as the body is concerned.

Mr. Corcoran: That is all I am interested in.

Q. You are familiar with the report of Mr. Thomas of the happenings in Lee in October, which has gone into evidence, are you not? A. Yes, sir, I am.

Q. Was there, to your knowledge, an official order for change having to do with the area of the box culvert, C-1?

[185] A. Yes, there is an official order from the resident

engineer to me designating the change, the size of the change, and where it is to be.

Q. What do you say as to the reasons for the D'Onfros not being able to proceed with the box culvert?

Mr. Corcoran: I object.

Mr. Cain: Mr. D'Onfro himself has said that he was not—

The Court: You are asking what the reasons were?

Mr. Cain: Yes.

The Court: The conversation you may give; the reasons, no.

The Witness: I don't understand.

The Court: Before you rephrase that, still on Exhibit 5, a lot of the notations on this letter are in pencil and a lot more are in ink, and it would appear as if the ones in pencil were all made by the same pencil, and the ones in ink by the same pen, although that is a mere assumption. Can you help me?

The Witness: Yes, sir. These pencil marks were made by Mr. D'Onfro as he had been talking to me in the discussion, and after explanations and discussion I put the pencil marks in by changes.

Q. Now, were you aware, Mr. Marino, of these various incidents? A. Yes, sir.

Q. In connection with the test pits, and all that sort of thing which the section engineer ordered? [186] A. Yes, sir, I was.

Q. Do you say that "On October 27, 1955, we were informed by the section engineers that a study would have to be made by them before we could complete our work on the footer?" A. Yes, sir.

Q. What is a footer? A. A footer is the base for the structure itself. It is a part of the structure.

Q. Of the culvert? A. Of the culvert.

Mr. Solomon: May I have that clarified? Am I to

understand that Mr. Cain indicates that Mr. Marino made that statement?

Mr. Cain: First I asked if he was familiar with the events, and he said he was. This is a statement from Thomas.

Mr. Solomon: I thought you attributed that statement to Mr. Marino.

Mr. Cain: No, never.

Q. Will you tell us, refreshing your recollection, if necessary, by that, from this section here, in your own words, what happened, what took place before the change order, what happened in connection with the change order itself, and what happened immediately after? A. We had performed this excavation approximately three weeks to a month prior to the start of Mr. D'Onfro on the construction [187] of this box culvert. We did not fine grade the bottom due to the fact that we expected some rain and stuff, and we were waiting for steel at the moment, and we left it that way. We then received the steel and I then ordered Mr. D'Onfro to get on the job and start the work. We then went in to fine grade the area, to get ready for it, and it was discovered then that there was a bad bottom, and we immediately had to cease work of any construction on it until tests were made to determine the varying area of the particular footage. We had to cease all work and then redesign the order. Under the terms we cannot do any work until the redesign is official. The official change order is arrived at and given to us before we can commence operations again in that particular area. And that was why at that time Mr. D'Onfro did not do any work.

Mr. Corcoran: What time is this?

Q. When did you receive the change order? As I say, you may use this if it helps you. A. This would not give

me the date of the change order. That would be from Brown & Blauvelt.

Q. What is this here [indicating]? A. On November 3 I received a letter from the engineers directing a change.

Q. Does that mean a change order? A. That was an official order in writing directing a change.

Q. So that that is the date? [188] A. That is the date we received the letter from Brown & Blauvelt.

The Court: Was that the change order?

The Witness: It was not the change order itself, no, sir.

Q. The change order is not in letter form? A. No, sir, it is not; on regular form.

Q. Do you know whether or not it came after that or before that? A. I do not recollect. It was a design change.

Q. Having been ordered to change, what was then done? A. After we were ordered to change, then we completed the bottom, got everything ready to go back into regular work, and went right along.

Q. Did you complete the bottom, or one of your subcontractors? A. One of our subcontractors completed the bottom.

Q. Did you at some point receive an official word that it was all right now to proceed? A. That is right, I did.

Q. Do you know the date of that? A. In my memory, no. It is in the correspondence, though.

Q. Can you give us some idea of the amount of time that was required for Elmhurst, who was one of your subcontractors, to complete this operation before it would have been possible for D'Onfro to go ahead? A. As I recall it, it only took a few days, a week, and [189] Mr. D'Onfro was ordered back the next Monday to commence operations again after Elmhurst had completed his work.

The Court: When was this; next Monday?

The Witness: No later than October 24.

Q. No; I am not talking about that part of it. This report says as follows: "Having received a letter from the engineer directing the change dated November 3," and his report goes on, "We of course notified Elmhurst of this change, and they in turn brought in men and equipment on November 8 and began the necessary work." Will you give the Court some idea of the amount of time that elapsed between the start by Elmhurst and the completion of that work? A. It could not be more than a week with the amount of work involved.

The Court: It was after that week had expired that this Monday occurs that you are speaking of, that you told D'Onfro to come in and work?

The Witness: No. I was confused, your Honor, with this top paragraph.

The Court: I am confused. I would like to know which Monday it is.

Q. Do you have a recollection of ordering D'Onfro back on the job when Elmhurst had finished, or not? A. No, I do not.

Q. At any rate, it is true, is it not, that D'Onfro never came [190] back after he left on October 27? A. Not to my knowledge.

Mr. Cain: If everybody is agreeable we can stop now, and it will make for faster progress in the morning when we get more of this together.

The Court: Very well.

[Adjourned at 4:40 p.m. to 10:00 a.m. Thursday, December 13, 1956.]

[191] THIRD DAY

Court Room No. 2
Federal Building, Boston
Thursday, December 13, 1956.

JOSEPH MARINO, RESUMED.

Direct Examination by Mr. Cain, Continued.

Q. Mr. Marino, there are one or two things in your testimony of yesterday you would like to correct? A. Yes.

Q Does one have to do with your employment for the Lizza Company over the last two years? A. Yes.

Q. What is that? A. That I left approximately January 1st.

The Court: You what?

The Witness: I left the firm January 1st.

Q. You were employed with them up until January 1st of 1956, and out of their employ for what period? A. Up until July of 1956.

Q. And since July 18, you have been in their employ to the present time? A. That is correct.

Q Now you were a participant in the meeting at the Bancroft Hotel in Worcester? [192] A. I was.

Q. That was in June that has been testified to. A. Yes.

Q. Who was present at that meeting? A. Mr. Al Lizza, Mr. Daniel D'Ontro, Mr. Cavello and myself.

Q. Was this a breakfast meeting? A. Yes. We had breakfast at the time.

Q. Who got the meeting together, if you know? A. I think I called them to meet them up there.

Q. And what was the subject? A. On the discussion of the work and the contract.

Q. Was the matter of the $8,000 discussed at that time? A. It was.

Q. Will you tell us the conversation that took place on

that subject as well as you can remember it? A. Well, the conversation started off with the prices submitted and the proposal that we had made to the Turnpike Authority. The D'Onfros were aware of the fact we used their prices and then Mr. Lizza and Mr. Daniel D'Onfro were conferring about it.

Q. At the table? A. It started at the table. I think it wound up in the lobby.

Q. Tell us what you heard. A. Mr. Daniel D'Onfro and Mr. Ralph D'Onfro then had a little separate conversation, and they agreed—Mr. Lizza was asking for the $8,000—

[193] Mr. Corcoran: I object to that.

The Court: That may go out.

Q. Let me see if I understand you correctly. Mr. Lizza and Mr. Daniel D'Onfro talked between them and you didn't hear that? A. I heard most of it.

Q. Tell us what that was. A. That was a discussion. Mr. Lizza was asking Mr. D'Onfro that he would like to get an amount of money to cover his overhead and certain other expenses involved out of the total amount, which amounted to approximately $8,000.

Q. What did Mr. D'Onfro say? A. Mr. D'Onfro agreed with Mr. Lizza.

Mr. Corcoran: I object.

The Court: That may go out.

Mr. Corcoran: May we have what he said?

The Court: I hope so.

A. [continuing] Mr. D'Onfro said it would be all right.

Q. Was this still at the table? A. I think we were out in the lobby then.

Q. You heard that, too? A. Yes, sir.

Q. After that what took place? A. Well, as far as I could remember Mr. Lizza and Mr. D'Onfro shook hands, and then we went out from there, started to look at another job.

[194] Q. That is the Auburn job? A. Yes, that we intended to bid on.

Q. I show you this, these two sheets, and I ask you what it is? A. This is a complete breakdown of all the proposals submitted by all the general contractors that bid on this contract sent to each individual general contractor that bid on the job by the Massachusetts Turnpike Authority.

Q. What is the second page? A. The second page is just another contract. They didn't have room to put it on the page.

Q. Is this sheet we had yesterday cut off on the right a photostat of the Lizza column and the numbered items? A. Yes, it is.

Mr. Cain: I now offer this as an exhibit.

Mr. Corcoran: Can he testify this is an xact copy of an original? In this form I am going to object to it, your Honor. I don't see that this is an original.

The Court: May I see it?

[Mr. Corcoran hands document to the Court.]

The Court: This is what you are offering?

Mr. Corcoran: Do you offer both?

Mr. Cain: No. I offer only the one that is relevant, just the Lizza column. I don't believe we are concerned with all the other bids of all the other general contractors.

The Court: Is this a copy you made, Mr. Marino, [195] or is this the actual one you received?

The Witness: That is a photostat.

The Court: Of what you received?

The Witness: Yes.

Mr. Corcoran: Is that a photostat?

Mr. Cain: I am certain it is a photostat of the first six inches, or whatever it is, of the left side of a large sheet I I believe, a recapitulation of all those bids sent to us.

The Court: Technically I don't suppose it is proved.

Mr. Cain: As a copy of the original?

Mr. Corcoran: My question only applies to the big one. If the big one doesn't get in, the other one cannot.

Mr. Cain: We are in position to prove it. Mr. Gerber told me he photostated it himself. But I offer the original.

Mr. Corcoran: It is not an original.

The Court: Well, I ask you again, Mr. Marino, is this the one you received or a copy of what you received? I am speaking of the big one.

The Witness: This is the one we received in the office.

The Court: This big one, Mr. Cain, has a receipt typed right on it, whereas this has obviously been prepared by some kind of a process. This appears to be a duplicate [196] original. I will admit whichever the plaintiff prefers.

Mr. Cain: I think I will change the offer. I offer the original.

The Clerk: Defendant's Exhibit L.

[Massachusetts Turnpike Authority Proposals, Contract No. 51-021, Lee and Becket Project, Opened June 1, 1955, marked Defendants' Exhibit L.]

Q. Yesterday, Mr. Marino, a progress sheet went in bearing the date August 4th. I show you another progress sheet and ask you if you will identify it, please? A. This is the first copy drawn and submitted to the Massachusetts Turnpike Authority July 6th.

Q. You do not know of your own knowledge as to whether this was seen by D'Onfro, or do you? A. You mean if I was present?

Q. Yes. A. No.

Mr. Cain: We are prepared to prove through another witness it was.

The Court: Mark it for identification.

Q. My next question is with reference to this progress

sheet. What date was is issued? A. What date was this issued?

A. What date was this issued?

Q. Yes. A. I don't quite understand.

Q. Who issued in this case the progress sheets for the Lizza [197] contract? A. Well, this particular one was by Mr. Cavello.

Q. It is issued by the general contractor? A. That's right.

Q. When was this one prepared and issued? A. This was prepared and submitted approximately July 6th.

Mr. Corcoran: Excuse me. The suggestion of the Court, as I understood it, was that it be marked for identification. Since you are taking in two or three of these, it perhaps might be well to identify them, so we will know which progress schedule you are talking about.

The Court: Yes. I am expecting they will be. I thought you wanted to know something about it at first.

Mr. Corcoran: Would that be inconsistent with marking this for Identification?

The Court: No. But if he wants to learn everything about it from this witness he may.

Q. What are these pencilled notations on it? A. These penciled notations are rough computations of the amount of money to be completed in that period shown on this graph.

Q. Opposite the word Structures there is a line which goes from one date to another, and then there is a break and another line and at the same level going from a date in 1956 to another date in 1956. Is D'Onfro part of this project in the Structures [198] category? A. Yes, sir.

Q. Are there other Structures other than the D'Onfro structures involved in that category? A. Are there other Structures?

Q. Other than structures to be construed by D'Onfro?

A. Well, there are other contractors' work involved in the same Structures.

Q. But the 858,000, which appears on the 1955 line opposite Structures, represent all the work on structures? A. Yes.

Q. In that time period? A. That includes structural steel, steel H-beams that have to be driven, and everything else, excavation.

Mr. Cain: I would like to have it marked for identification now.

The Clerk: Defendants' Exhibit M.

[Progress Schedule marked Defendants' Exhibit M for Identification.]

Q. Will you also help us in reading this? How do you read this as to starting date and finishing date in 1955 and the starting date and the finishing date in 1956?

Mr. Corcoran: Just a minute. Are you going to talk about Structures and date?

Mr. Cain: As to Structures.

[199] Mr. Corcoran: I object. It isn't in to begin with.

The Court: It is not in evidence for one thing.

Mr. Corcoran: And at the time you plan to introduce it, I will say now that your Structures on there call for something like, I forget the legend, $858,000 and our contract—nobody has ever claimed it went over $400,000, and he has testified other structures are in there.

Mr. Cain: If I may argue that point. No structures begin prior to the date shown by that line, on the day above it. The reason I would like to ask the question of Mr. Marino is because we are prepared with a witness in the court room—

The Court: I will take it all subject to the admissibility of the exhibit.

Mr. Cain: I so understood it.

Q. Would you please, using this read for us, starting

and finishing dates in both years for Structures? A. The starting date for Structures contemplated 11-15; shutdown at approximately December 15th for the winter period; restart the Structure work again on March 15th, and completion work of the Structures was to be 8-30.

The Court: Does that answer mean for me to understand, Mr. Marino, that if there was a contract with D'Onfro no work was to be started before 11-15?

The Witness: No work that we could figure within, you know, a small period, give and take. In other words, we [200] had certain other work to be prepared before we could get the structures started.

The Court: You said something about that having been submitted. Did you mean submitted to the Turnpike Authority?

The Witness: Yes, your Honor.

The Court: All right.

Q. I show you the so-called Green Book and ask you what that is? A. The so-called Green Book is issued by the Massachusetts Turnpike Authority, and it is the standard specifications we are to use in the construction of the turnpike.

Q. Is this the set of specifications referred to in these various drafts of the contract between Lizza & Sons and D'Onfro? A. It is.

Q. And referred to in these various drafts as binding the parties to the subcontract?

Mr. Corcoran: I believe they speak for themselves. I will agree it is the one referred to in that, if it will help.

Mr. Cain: All right.

Q. Would you find for us here, please, the paragraph dealing with alterations, which I believe is Paragraph 22? A. "Article 22. Alteration of Work."

Q. Was the alteration or change-over order about which you testified yesterday having to do with the footings for

the [201] box culvert C-1 within this category of alterations referred to in that paragraph?

Mr. Corcoran: I object.

The Court: I don't understand that question anyhow.

Mr. Cain: Well, if I may explain?

The Court: Reframe the question, or, I will frame it: The change order he spoke of, was that something that was made pursuant to Paragraph 2 [22]?

Mr. Cain. That is it.

The Court: Do you object to that question? You can, you know.

Mr. Corcoran: No, I won't object.

Mr. Cain: I won't object, either.

Mr. Corcoran: My only thought was, I thought he might give the facts, and you would physically have Article 22, and you could make up your mind whether or not it fell within Article 22.

The Court: I may well decide contrary to what he says, but I will take the answer.

Q. Do you have the question in mind? A. Yes. Article 22 is pursuant to the change.

Q. Or vice versa? A. Either one.

Q. All right.

Mr. Cain: I offer this book for the sole purpose of Article 22. [Mr. Cain and Mr. Gerber confer.]

[202] Mr. Cain: It has been suggested I offer the entire book.

The Court: In view of the objection your brother took, it might be wise. There might be some other paragraph—

Mr. Cain: I do so.

The Clerk: Defendants' Exhibit N.

[Standard Specifications for Massachusets Turnpike, October, 1954, marked Defendants' Exhibit N.]

Q. In a situation where a change order has issued from the Authority pursuant to that Paragraph 22, what is the

usage of the trade as to what takes place once a change order has been so issued? A. What takes place? Well, what generally takes place and always takes place is that you must receive the change order, and then if it is through no fault on the contractor's part this delay is caused we nominally then bill the Authority or the owner, whichever it might be we are working for, for all charges, and if it is the fault—if the fault on the change order lies with the contractor himself, and he's the cause of the delay through no fault of the subcontractor, then it is normal for the subcontractor to bill the contractor direct for delays not caused by him.

Q. Is there contact in this custom and in this situation between the subcontractor and the Authority? [203] A. Would you repeat that?

Q. Is there contact, is there direct contact? A. There is never any direct contact between the subcontractor and the Authority. You must always go through the prime contractor in every fashion.

Q. In connection with this particular change order, whether or not you said anything to Mr. D'Onfro with reference to making contact with the Authority in his behalf for compensation for the delay?

Mr. Corcoran: May we find out which Mr. D'Onfro we are talking about?

Mr. Cain: Any of the D'Onfros. This is just whether or not—?

A. If you mean I had written a letter to the Authority protesting the delay, it was no fault of ours or our subcontractors—

Mr. Corcoran: I object to that.

The Court: I exclude that.

Q. Did you have any talk with any of the D'Onfros about doing that? A. I seem to recollect a conversation with Ralph in our trailer office on the site, that I would do that.

Mr. Cain: I call your Honor's attention at this point to provisions, which I am quite certain appear in all the drafts of the contracts, and I have in my hand a copy of the first one.

[204] Paragraph 5:

> "The Subcontractor further agrees that the work called for hereunder shall be coordinated with the work of the Contractor and such other Subcontractors as may be engaged on the over-all project in a manner designed to accomplish the most efficient and economical completion of the entire project; and the Subcontractor further agrees that the work performed by it will be under the general superintendence of the Contractor."

Q. Mr. Marino, would you tell us what the usage of the trade is pursuant to that provision? A. That provision—

Mr. Corcoran: I object, if your Honor please. Here we have it in the contract. Why don't we stick to that rather than talk about usage?

The Court: I will take the answer as an offer of proof and decide whether I will then admit it.

A. That paragraph in the contract—he is at all times to obey our orders. His sequence of work in areas is to be under our orders where and when and how he is to work, what location he is to work at, what he is to progress first, or any other way.

The Court: Do you object?

[205] Mr. Corcoran: I will withdraw my objection.

Q. Do you recall you testified yesterday with reference to the delay caused by this change order during which time the Elmhurst Company, one of your subcontractors, made tests and made changes in the footing of box culvert C-1? Do you recall that? A. Yes, I do.

Q. Are you now familiar with the dates of these events

so that you can tell us the approximate date that Elmhurst finished that work? A. Yes, I am.

Q. And what was that? A. The approximate date Elmhurst finished that work was on November 11th.

Mr. Cain: You may inquire.

Cross-examination by Mr. Corcoran

X-Q. Mr. Marino, going to your progress schedules, we have had one dated July 26th, and your testimony, as I remember it, was that in that particular section dealing with Structures it showed a starting date of November 15. Did I understand t' at correctly? A. That's correct.

Mr. Cain: May I correct you? Did you say July 26th? It is July 6th.

[206] Mr. Corcoran: I beg your pardon. July 6th.

X-Q. However, isn't it also true that there was a revised schedule? It seems to me you said, Ref, August 4, which has gone in here, which bears the legend, Supersedes—is that substantially so? A. That's correct.

X-Q. So that whatever the exhibit is—I don't happen to know it—the only progress schedule that is in so far, was that later revised? Is that true A. That's correct.

X-Q. Now then in yesterday's testimony you were attempting to remember the time when you had your conference with Daniel and Ralph D'Onfro. I believe it was in your office. In any event, it was at the site. And slope paving was the subject of the discussion. You were insisting that it was to be in th contract, as you people originally drew it, and they were insisting it was to come out. We are trying to get the date. Will you answer: Was Ralph's equipment on the site then, Mr. Marino? A. At that time? N .

X-Q. It was not. Do you know whether or not it had been on the site prior to this meeting? A. No, it hadn't.

X-Q. You are familiar with the fact, are you, that Mr.

Ralph D'Onfro's testimony was that he had brought up a crane, and [207] I believe some 10,000 feet of lumber? A. Yes, I'm familiar with it.

X-Q. And you are familiar with where that would be located? A. Yes, sir, I would.

X-Q. Bringing your attention particularly to the job that you contemplated that the D'Onfros would do on bridges, and leaving out for the moment the Appalachian Bridge, which is across the river—was it? A. No.

X-Q. Is it a foot bridge? A. No, it isn't.

X-Q. Tell us what it is. A. It's a structure 15 feet wide that can carry vehicular traffic too.

X-Q. But the other two bridges, one of them carries—one is a double bridge which carries traffic in one direction and one is a double bridge which carries traffic in another direction, is that true? A. That's correct.

X-Q. Now what was the first thing you people did in taking over this job in building these bridges? Did you have to do some excavating? A. When we took it over?

X-Q. Yes. A. I can't answer that.

[208] X-Q. What was contemplated by the proposed agreement with the D'Onfros in the building of that bridge? What order did you contemplate they would take the work of building any one of these larger double bridges? A. In what order? Immediately following the driving of piles, excavation.

X-Q. Stop there. They would have to drive piles? A. Not D'Onfro.

X-Q. Not D'Onfro? A. No.

X-Q. Well, put it this way. Piles would have to be driven? A. On certain of the structures.

Mr. Cain: Would you talk up loud?

X-Q. The piles, I take it, are for the abutments, are they? A. For the abutments and the piers.

X-Q. And the piers? A. And footings.

X-Q. What are abutments on the bridges, if you please? A. Abutments are—at the end of the bridge it's where the bridge is supported.

X-Q. Right flush with the road? A. Yes.

X-Q. Would there be footings on the pilings you are speaking about? A. Yes, they are commonly placed over the pilings.

[209] X-Q. Then you put piers on top of the footings?

Mr. Cain: Would you please keep your voice up?

X-Q. Did you contemplate the D'Onfros would do the wing walls? A. Yes. It's all in there.

X-Q. And that is work they contemplated they were to perform? A. It's all in their work.

X-Q. I see. What would be the first time under the circumstances that they would be able to do any of the slope paving? A. When their substructures are completed.

X-Q. By "substructures" do you mean the abutments would have to be done? A. The piers and abutments would have to be done.

X-Q. Because the slope paving runs from the bottom of the abutments to the foot, if you will, of your piers? Is that a fair statement? A. That's right.

X-Q. Now did the Standard Specifications of the Turnpike Authority call for any restrictions as to temperatures at which you could pour cement? A. Yes, it does with variations.

X-Q. But it does contain restrictions? A. It does.

X-Q. Did you at any time contemplate that whoever did the job on the structures would be pouring cement during the winter, Mr. Marino? [210] A. If you are referring to the progress schedules it shows you didn't shut down during the winter.

X-Q. Is your answer then that no matter what progress schedule is before us, there would be no cement poured

after December 15? A. No. It varied with the weather conditions. That is the control.

X-Q. I asked you whether or not the progress schedules called for that? A. The progress schedule called for winter shutdown.

X-Q. That's right. December 15 to—

The Court: —March 15.

X-Q. Now then, who had the excavation contract, Mr. Marino? A. The bridge excavation?

X-Q. Well, all right. Who had the bridge excavation? A. D'Onfro.

X-Q. There is another type of excavation, is there, contemplated by the contract? A. General roadway excavation.

X-Q. Who had that? A. A portion was held by the Elmhurst Construction Company.

X-Q. In the general roadway excavation what was to be done on this job? A. We were to make excavations through the cut areas, use the same material to build embankments through the fill areas.

X-Q. Incidentally, is it fair to say that you had about 4-1/2 [211] miles of road to build here? A. Yes, it's just about that.

X-Q. But your road excavation contractor had the job of excavating so that eventually the road is a level road? That is a layman's way to put it. Is that substantially it?

Mr. Cain: If you Honor please, most of the questions' relevancy escape me.

The Court: I think I see where he is going. Go ahead.

X-Q. That is what your road excavation contractor does? A. The road excavation contractor.

X-Q. He uses scrapers? A. He uses shovels, scrapers, trucks, whatever is necessary for that particular type of work.

X-Q. What do you do when you come to rock? A. Blast.

X-Q. After you blast it what do you do with it? A. Place it in the embankment.

X-Q. Place it in the embankment. When we're talking about the business and custom dealing with subcontractors —you said one of the things you sometimes do is shop around a little? A. That's right.

X-Q. Did you do any shopping around in this case? A. Well, we had other prices.

X-Q. How many subs bid on this job, if you remember? [212] Mr. Cain: I object to this.

The Court: What part of the job?

Mr. Corcoran: Just the one that is in litigation, the structures.

The Court: You may have it.

A. I don't recall.

X-Q. Once again I am asking you: Did you do any shopping around with regard to just this contract, that is, the subject of this litigation here? A. If I recall correctly, not this particular one.

Mr. Cain: I didn't hear.

The Court: He said that if he recalled correctly, not this particular one.

X-Q. Did you—

The Court: Mr. Marino, you have been testifying for two days. You ought to learn how to keep your voice up.

The Witness: I'm sorry, your Honor.

X-Q. Did you ever contact the Western Massachusetts Engineering Company with regard to this job? A. Personally, I never did.

X-Q. Did anyone in your organization to your knowledge contact the Western Massachusetts Engineering Company with regard to this job, and I refer just to the work contemplated by Mr. D'Onfro? A. I don't know.

X-Q. You don't know? [213] A. No, sir, I don't.

X-Q. Have you any reason whatsoever to believe that

anyone contacted the Western Massachusetts? A. May I explain one thing?

The Court: I would think so, in answer to that question.

X-Q. All right. A. We have a main office and we have estimators and we have engineers, etc., that do make investigations. I am out in the different areas a lot. They may be doing things I don't know about at the time.

X-Q. All right. The answer is then, to your knowledge, there was no shopping in this particular case? A. To my knowledge.

X-Q. Who had the clearing contract up there, Mr. Marino?

Mr. Cain: What contract?

Mr. Corcoran: For clearing the site.

X-Q. I take it that one of the first jobs you have is to clear out the trees, and so forth? A. The Eastern Tree.

X-Q. Do you know the name of the company? A. The Eastern Tree Company. That's the name of it.

X-Q. Where are they located? A. I don't recall exactly.

X-Q. They submitted a bid, the way we did, or just the way [214] D'Onfro did, a bid for the clearing? A. That's right, sir.

X-Q. And at some time did they appear on the job site? A. Yes, sir.

X-Q. That was the job that had to be done first? A. That's one of the first jobs.

X-Q. Is there something before that? A. One of the first things you do on a job is to set up your office, set up your plant, do any prefabricating necessary, do your engineering layout, and so forth.

X-Q. I see. Do you remember when Eastern Tree appeared on the site? A. The exact date? No, I don't.

X-Q. How close can you come? A. I wouldn't care to say. It was early.

X-Q. Do you know of any records your company might

have as to when this date might be? A. Yes. It would show on our daily reports.

X-Q. You keep a diary of it at the job site? A. The daily report, not a diary.

X-Q. Not a diary but a report? The daily report would show this type of information? A. It would show when he was on the job.

X-Q. And Elmhurst was on the job?

Mr. Cain: You're talking about Elmhurst?

[215] Mr. Corcoran: I'm sorry. I mean Eastern.

The Court: He thinks it ought to be Western, you see. That's what confuses him.

X-Q. Do you think Eastern was on the job in August? A. In August?

X-Q. Yes. A. I think so.

X-Q. Do you think Eastern was on the job in July? A. I couldn't say exactly.

X-Q. Do you think Eastern was on the job prior to the time they were approved by the Turnpike Authority?

Mr. Cain: I object to that. May I see the progress sheet?

The Court: He may answer the question, if he can.

A. Would you repeat it, please?

X-Q. I will try. Do you think Eastern was on the job prior to the time you received the approvals we have been talking about here from the Turnpike Authority? A. If I remember correctly, Eastern had a special approval due to the fact they were doing clearing work for the other contractors on either side of us.

X-Q. I see.

Mr. Cain: This certainly is helpful [handing document to Mr. Corcoran]. I am ready to offer this at any time.

Mr. Corcoran: It's all right with me.

[216] The Court: All right. That was Exhibit M?

The Clerk: Yes, your Honor.

[Document formerly marked M for Identification received in evidence.]

X-Q. According to this Exhibit M, clearing and grubbing were to start July 15, 1955. A. That's correct.

X-Q. And this Eastern Tree we have been talking about falls within the category of the clearing and grubbing? A. That's correct.

X-Q. Once again I ask you: Do you know whether or not Eastern Tree started in July? A. Yes, they did.

X-Q. Did you have a written agreement with Eastern Tree in July as to the performance of this work? A. A written contract?

X-Q. Yes.

Mr. Cain: I object to this. It seems to open the door to all the details about it.

The Court: I think he can ask him simply whether they started before or after they had a written agreement without what the terms of it were.

The Witness: To the best of my knowledge we had a written agreement with them.

Mr. Cain: Well, that is the part of the question that was excluded. I think your Honor suggested a different [217] question.

The Court: The question I suggested was whether they started before they had any written agreement.

The Witness: No, sir, I don't think they did.

Mr. Corcoran: That's all.

The Court: Do you have any redirect?

Mr. Cain: No, your Honor.

The Court: Mr. Marino, you said something at the beginning of your testimony, and I would like to elucidate a little—you said, if I quote you correctly, that you were shooting for this job. Would it be reasonable for me to assume that in some cases you, as a general contractor,

don't care too much whether you get a job or not, and so you may bid a little high, whereas in other cases, and this is what you meant here, you were anxious to get the job, and so you bid as low as you could?

The Witness: That is correct, your Honor.

The Court: Thank you.

Mr. Cain: That's all, Mr. Marino. Mr. Lizza.

ELIA E. LIZZA, Sworn

Direct Examination by Mr. Cain

Q. What is your full name? A. Elia E. Lizza.

Q. Where do you live, Mr. Lizza? [218] A. 194 Ainsley Street, Oyster Bay.

Q. What is your position with Lizza & Sons? A. I'm President of the corporation, sir.

Q. And you are a stockholder of Lizza & Sons? A. Yes, sir.

Q. Were you present at the breakfast at the Hotel Bancroft which Mr. Marino has testified about? A. Yes, sir.

Q. Can you fix the approximate time of that? A. I would say it was about 9 or 10 o'clock in the morning.

Q. I mean, what part of what month? A. It was the morning of—between the 10th and the 20th of June.

Q. Did you arrange this meeting? A. Through Mr. Marino.

Q. The meeting was your idea? A. Yes, sir.

Q. And were Mr. Daniel D'Onfro, Sr., Mr. Ralph D'Onfro, Mr. Marino and Mr. Cavello there? A. Yes, sir.

Q. Anybody else? A. I had other people. I wanted to meet other subcontractors over there. But in this particular instance it was Mr. Cavello, Mr. Marino, the old gentleman and Ralph.

Q. Now did you have conversation with Mr. Daniel

D'Onfro, Sr. [219] about the $8,000 during breakfast? A. Yes, sir.

Q. Would you tell us what that was, confining yourself to just talk that was made by either of you or anybody else in the party in your presence? A. The conversation was—I told him we had the job and I would like to get $8,000 out of that because I needed it for supervision, for overhead, mailing, and so forth and so on, and we talked it over for a few minutes, and he shook his head and said, "All right, I'll do it." He shook hands with me, and that was the end of it.

Q. All right. Now did you in November 1955 go to the job site in Lee and have some conversation with Mr. Daniel D'Onfro and Mr. Ralph D'Onfro? A. Yes, sir.

Q. And do you remember about what part of November it was? A. Really I don't remember. It was sometime in November. I would say it was after the 15th of November anyway.

Q. You recall the letter of November 9th, the long letter of November 9th, which they wrote? A. Yes.

Q. Was it after that you had received that letter? A. Yes, sir.

Q. Who was present at this meeting? A. At that meeting was Mr. Ralph D'Onfro, the old gentleman, [220] Mr. Dougherty and Mr. Gerber.

Mr. Corcoran: If your Honor please, can we discuss this?

Mr. Cain: Sure.

[Conference at the bench between Court and counsel.]

Mr. Cain: You may inquire.

Cross-examination by Mr. Corcoran

X-Q. There has been testimony, I think before you got here, Mr. Lizza, concerning a conference you had with Daniel and Ralph on July 13th in your Oyster Bay office.

A. No, sir. I said I met Mr. D'Onfro, Mr. Daniel D'Onfro, Ralph D'Onfro, my engineer, myself—we met at the site over here, we met at Worcester. That was the first meeting. But due to the fact I had met the old gentleman at Boston. I had had the pleasure of meeting him at that time. That was it.

X-Q. All right. Once again: Do you now say you did not meet with Mr. Daniel D'Onfro?

The Court: No, he didn't say that. He didn't understand your question.

X-Q. I will try it again. Do you recall a meeting at Oyster Bay on July 13th? A. No, sir; I don't recall meeting him in Oyster Bay, no, sir.

[221] X-Q. You feel the meeting at Worcester was on or about June 10th? Does that sound right to you? A. Sometime then.

X-Q. Shortly after the bids were opened? A. The 10th, 15th, or 20th, that's right.

X-Q. All right. And you say that you did not meet in Oyster Bay with Mr. Daniel D'Onfro and Mr. Ralph D'Onfro, at which this contract and the $8,000 was discussed? Is that true? A. I don't remember that.

X-Q. You say you don't remember it? A. You never asked me that, whether I met him at Oyster Bay.

The Court: He asked you a minute ago.

The Witness: I don't remember meeting Mr. D'Onfro at Oyster Bay at that time. Perhaps I did. I don't recall it.

X-Q. In other words, it is possible there was such a meeting in Oyster Bay but you don't remember it? Is that true? A. Yes, sir.

X-Q. At your breakfast meeting, Mr. Lizza, in Worcester at the hotel, with Mr. Ralph D'Onfro and Mr. Daniel D'Onfro, the business of this payment was discussed?

That is true? A. Yes, sir. We met for the purpose of the job.

X-Q. Did you arrive at your figure of $8,000—were you the first one that suggested $8,000, by the way? A. That was the purpose I was meeting him—to discuss the job, and I would like to get $8,000 or $10,000 for the overhead. [222] X-Q. The main purpose of meeting the D'Onfros in Worcester was to discuss this business of a payment? A. No. It was to discuss the whole job.

The Court: I couldn't hear the answer.

Mr. Corcoran: He said it was to discuss the whole job.

The Witness: That was part of it.

X-Q. Did you meet with them for any other purpose? A. No, just for that purpose, and he was going to show us another job to be let out there.

X-Q. Were you the first one—what did you say $8,000 or $10,000? A. Perhaps I said that. I don't remember exactly. I said $8,000 or $10,000. Perhaps I said that, yes.

X-Q. In figuring that it was $8,000 or $10,000 or $8,000 to $10,000, did you or someone working for you break down your overhead so as to find out what proportion of this contract should be borne by the D'Onfros? Is that the way you arrived at it? A. No, I didn't. When he gets $400,000, $8,000 or $10,000—it's not enough to cover the overhead. It's just one of these things. We just have to be reasonable about it.

Mr. Cain: I ask that go out.

The Court: Yes, it is out.

X-Q. One more question, Mr. D'Onfro. Did you arrive at the [223] $8,000 or $10,000 by proportioning the share of the overall contract to the D'Onfros? A. I didn't do that, no.

X-Q. You did not? A. No.

X-Q. Is it fair to say it was a figure picked out of the air? A. No. It wasn't picked out of the air, no.

X-Q. Was it based on, for example, the concrete in the job? A. It was based on what we would have to carry—paying out, sending out the checks, and so forth, and the overhead of the office. After all, we have to handle the job, don't we?

X-Q. Oh, yes, you have to handle the job. Were you going to have the D'Onfros in their bonus payment to you take care of all of the overhead or just what was applicable to their job? A. No. I was going to have them pay no bonus.

X-Q. You were going to have them pay $8,000, weren't you? A. That's right.

X-Q. This was $8,000 less than their bid quotation to you, was it not? A. That's right.

X-Q. Did you feel this $8,000 was going to cover all of the overhead that had to do with just the job they were going to do on Structures?

Mr. Cain: I object.

[224] Mr. Corcoran: This is merely explanatory of what he is trying to tell us.

The Court: I will take it.

X-Q. Was there any basis for this $8,000?

The Court: Have we had the answer to that question?

Mr. Corcoran: May we have the question?

[The pending question is read.]

A. It wasn't going to cover all the overhead.

X-Q. On their part of the job? A. Even on their own part of the job.

X-Q. When you or somebody working for you, if you know, went over these bid quotations which are in evidence, Exhibit 1, I think, did you know that the items as bid by D'Onfro were going to be such that you would lose money on this part of the job? A. I didn't know that.

X-Q. You didn't know that? A. No.

X-Q. Did you think you were going to break even on the job? A. I didn't even know that.

Mr. Cain: Is he talking about the entire job?

Mr. Corcoran: No, about structures.

X-Q. You didn't know? A. No, sir.

X-Q. At some time did you or anyone in your organization try [225] to figure whether or not $392,610, if that is the proper price, was enough money so that you would make money on this job?

Mr. Cain: I object to that.

The Court: The witness has already given some answers that rather intrigue me. On this part of the job? Is that the way the question is to be given?

Mr. Corcoran: That's right, sir.

The Witness: Would you ask me the question again?

[The pending question is read.]

A. We couldn't make money on the contract because we were using D'Onfro's prices.

X-Q. And that you knew when you made your bid to the Turnpike Authority, didn't you? A. That is true, yes.

X-Q. That's right. So that if you were even to break even on this job, so far as structures were concerned, you had to add something to their items, did you not? A. That's right.

X-Q. And you knew that when you made your bid, didn't you? A. That is true. May I—?

X-Q. Pardon me. Where did you plan to make your money on this job?

The Court: This part of the job, do you mean?

Mr. Corcoran: This part of the job.

[226] A. D'Onfro's job?

X-Q. Yes. A. I didn't expect to make it any place on their job.

X-Q. But you felt if you bid their items just as they

submitted them to you that you would lose money? A. But I didn't tell them to take the job, after I got the job. I didn't force those people to do it, to take the job. I didn't tell them they had to give me $8,000 or $10,000. I didn't force them. I would have given it to them just the same if he had said—

X-Q. Well, now you have left me—

The Court: He's done a good deal.

Mr. Corcoran: May I have the answer read back?

[The answer is read.]

The Court: That is just what I heard.

A. [Continuing] If he hadn't said—

X-Q? If he hadn't said what?

The Court: If he hadn't said Yes?

The Witness: If he didn't want to give me the $8,000 or $10,000, I probably would have given him the job the same anyway.

The Court: That is the way I understood it.

The Witness: I didn't force him to—that he had to give me the $8,000 or $10,000 or $9,000. That was just discussion. He agreed to it and that was it.

[227] X-Q. When you were doing your negotiating with Mr. Daniel D'Onfro in Worcester, did you say to him, "Now if you don't want to give me this $8,000, it's all right. The contract is yours"? A. I didn't say that.

X-Q. You didn't say that? A. No. Even would you.

X-Q. No, I don't think I would.

The Court: Not even him, do you mean? Not even you, is what he meant.

X-Q. But in any event you didn't put it that way, did you? A. No.

X-Q. And you didn't leave him with the impression he was going to get it without the $8,000? You were a good business man. A. I was pretty friendly with him. I wasn't mad at him.

X-Q. You shouldn't be. He let you have the $8,000.

The Court: Is that an admission?

Mr. Corcoran: That's all. Thank you, Mr. Lizza.

Mr. Gerber: Is it all right if Mr. Marino and Mr. Lizza go back to New York?

The Court: It is if Mr. Corcoran doesn't need them. Do you want them to stay?

Mr. Corcoran: No, sir. Go ahead.

Mr. Gerber: They will stay a few minutes longer.

Mr. Corcoran: As far as I'm concerned, they may go.

[228] VIRGIL DANTE D'ONFRO, Sworn

Direct Examination by Mr. Corcoran

Q. What is your full name, please? A. Virgil Dante D'Onfro.

Q. Would you speak up, please? A. Virgil Dante D'Onfro.

Q. Where do you live, Mr. D'Onfro? A. 712 Main Street, Leominster, Massachusetts.

Q. How old are you, sir? A. Twenty-six years old.

Q. And you are the Virgil D'Onfro who is mentioned in these pleadings, and are you one of the partners of Daniel D'Onfro's Sons? A. Yes, sir.

Q. Now at some time in November of 1955 did you have occasion to drive your father to Oyster Bay, New York? A. Yes, sir.

Q. Do you know when the date was? A. November 10th.

Q. And the night before did you and your father Daniel and Ralph have occasion to talk together? A. No.

Q. Have you testified that you drove to Oyster Bay? A. Yes.

Q. Did you drive your father to Oyster Bay? [229] A. Yes.

Q. What was the purpose of your driving your father

to Oyster Bay? A. To bring a letter down to Mr. Lizza.

Q. Your father had the letter with him? A. Yes, sir.

Q. Do you happen to know the date of the letter? A. No, sir, I don't.

Q. Have you any idea what was in that letter? A. It was something about giving the job up.

Q. Now then, when did you leave?

The Court: The approximate date?

Mr. Corcoran: November 10th, if your Honor please.

Q. When did you leave for Oyster Bay? A. About 5:30 in the morning.

Q. Just you and your father, Daniel? A. Yes, sir.

Q. And when did you get to Oyster Bay? A. Approximately 10:30.

Q. And you went into the offices of Lizza & Sons, Inc., did you? A. Yes, sir.

Q. What occurred when you got into those offices? A. When we first got in, we met the receptionist, and my father asked if Mr. Lizza was there, and the receptionist said, "Mr. Lizza is out of town." So at that time, someone in the office [230] came up and was talking with my father, and said that he would put a call in to Mr. Lizza, wherever he was, and he asked us to wait, so we waited around about five or ten minutes, waiting for the operator to get a call through to Mr. Lizza, and then finally they escorted my father and I into an inner office, and we waited for the call to come through. Well, the call did come through soon after we got in the room. My father talked to Mr. Lizza on the phone. And he said that it was very urgent to see Mr. Lizza, for Mr. Lizza to come down, that he had to see him, that he were even willing to wait overnight and wait for him, but I guess it was so that Mr. Lizza couldn't make it, so he asked my father to put Mr. Gerber on the phone. So Mr. Gerber went, I believe it was upstairs to an office upstairs, because it

sounded like he climbed stairs, and he was up there about seven or eight minutes and then he came back downstairs and he told my father at that time that Mr. Lizza had told him that anything he wanted to say to him he could say to Mr. Gerber. And then he explained then that he was Mr. Lizza's attorney.

Q. By the way, is that the gentleman at the end of the table here, Mr. Gerber? A. Yes, sir. And then after my father was assured that it was all right to say it to him, he went and started talking—he said that the rock for the slope paving, that if it was put back in the contract the way the contract was, the way the contract [231] always was, that this letter that he had with him didn't need o be opened, that it could be ripped up, that actually he didn't want to give it to him anyway, as long as they could agree to this rock for the slope paving being put back in the contract the way it was, and that ended that until they talked about concrete. My father said to Mr. Gerber that the concrete on the job, if Mr. Lizza would finance it, pay for it and pick up the discount, which was 50 cents a yard, that Mr. Lizza could keep 25 cents a yard and for us to get the other 25 cents. And then the discussion was over, and at that time—then I was introduced to Mr. Gerber and this other man that was there, and I don't remember his name, and then we left. And Mr. Gerber assured my father at that time, he said, "Dan," he says, "I'm sure we'll never have to open this letter," he says, "because everything will be all right." He says "You have my assurance." And then we left.

Mr. Corcoran: That's all, Mr. D'Onfro.

Cross-examination by Mr. Cain

X-Q. Did the conversation include a reference to the $8,000 provision of the contract? A. No, sir.

X-Q. Were Mr. Gerber and your father conversing at

any time when you were not present? A. I was present with my father at all times.

[232] X-Q. Now, Mr. D'Onfro, you are familiar with the fact that there is a bond in connection with this case for $392,610, are you not? A. No, sir, I'm not.

X-Q. Did you take any other trips with your father to any of the Lizza offices? A. No, sir, I did not.

X-Q. This was the only one in the whole year? A. Yes, sir.

X-Q. And you didn't take any other trips alone? A. No, sir.

X-Q. Or with anybody else? A. No, sir.

X-Q. All year long? A. That's right, sir.

Mr. Cain: That's all.

Mr. Corcoran: That's all. Thank you. That is the plaintiff's case, if your Honor please.

The Court: All right. Would this be a good time to suspend?

[Recess.]

[233] MAX GERBER, Sworn

Direct Examination by Mr. Cain

Q. What is your full name? A. Max Gerber.

Q. Where do you live, Mr. Gerber? A. 115 Ira Road, Sciosset, New York.

Q. That is in Long Island, near Oyster Bay? A. That's correct.

Q. And what is your profession? A. I am an attorney-at-law.

Q. And have you been throughout 1955 and 1956 general counsel for Lizza & Sons, Inc.? A. No. I came to work for Lizza on the June 14th—June 13th of 1955.

Q. Have you been their general counsel from that date to now? A. I have.

Q. Do you maintain an office in their offices at Oyster Bay? A. I do.

Q. And do you also maintain an office for private practice in another place? A. Yes, I do.

Q. Were you in the office at Oyster Bay of the Lizza Company on July 13, 1955? A. I was. Mr. Cain, I am in the Lizza office every day, unless I am out on their business, from approximately eight in [234] the morning until five in the afternoon. And this other office I maintain, I am only there in the evening, or if a special occasion arises, then I inform Lizza Company I will not be there, and this other office is nearby. But other than that I am always in the Lizza office during working hours.

Q. Yes. Was it on that date, July 13th, that Mr. Daniel D'Onfro and one of his sons came to the Lizza office? A. That's correct, sir.

Q. And which son was that? A. Ralph.

Q. Tell us what took place from the time that you first knew they were there. A. About, well, somewhere around 2 o'clock in the afternoon I received a call from the engineer's branch of the office that they wanted to see me. The engineer's office and my office are on the same floor. They are at present. I believe they were on the same floor at that time, too. I walked into the engineer's office, and there I saw Mr. Cavello, Mr. Cox, Mr. Daniel D'Onfro and Mr. Ralph D'Onfro. I was introduced to Daniel and Ralph D'Onfro, and I was told that they wanted a contract drawn in reference to a subcontract that was going to be given to the D'Onfros on this Massachusetts Turnpike Authority job.

Q. All right. From that point on did you take part in the conference? [235] A. I did.

Q. Will you now tell us what was said by those present? A. The conference took place in the small portion of the engineer's office upon which there is a drafting table and

upon this drafting table there was at that time this progress schedule, which both D'Onfros had been looking at, which was shown to me and was identified to me as a progress schedule. Frankly, before that I didn't even know what a progress schedule meant. Then I was told, I was given a sheet of paper, which is I believe Plaintiff's Exhibit 2. May I have that, please?

Q. Yes. A. I was given Plaintiff's Exhibit 2, and it was explained to me in the presence of Mr. D'Onfro and Mr. Cavello, and when I speak of Mr. D'Onfro it is Mr. Daniel D'Onfro, because he is the only one that partook of any of the conversations here, although Ralph was there. And I was shown this paper, and I was told that these items were the items that were to be placed in the particular contract, that I was to disregard the items through which there were penciled marks, the head walls and the structural and erection, and that the contract was to be —after we had received our final payment from the state, that there was to be deducted $8,000, which was to be Lizza's profit on this job, and the penciled notations minus, it was less $8,000, with the notation made, and it was circled. [236] Q. By whom? A. This was made by Cavello, I believe. The Class A Trench thing was marked at $2.00, and I didn't know where to locate the Class A Trench. So I was given a book of specifications and I was told that I could find that in the particular specifications. I thereupon said, "What are the terms, what other terms are there in this particular contract?" I was told that there was to be a 10 per cent deduction for retainage.

Mr. Corcoran: May it please the Court, may I interrupt? Instead of using the passive tense—would you say who is doing the telling, please?

The Court: Yes.

A. [Continuing] At this time I was told by Mr. Cavello —the conversations here were all with Mr. Cavello or

Mr. D'Onfro, with Mr. Cavello doing most of the talking.

Q. Just say who said what. A. Mr. Cavello told me that there was a usual clause of a 10 per cent reduction for retainage, that the clause, that the thing would have to comply with the Union labor, that there would be the usual penalty clauses in the contract, and he gave me a contract which had been drawn on a similar job to follow. I thereupon, when I received that contract, I asked or I spoke to Mr. D'Onfro and I said, "Mr. D'Onfro," and this is the old gentleman—I said, "these are the things that are going into the contract. Are they satisfactory with you?" [237] He said, "Yes." And I thereupon left and went into the next room and commenced drawing the contract, and Mr. Ralph D'Onfro and Mr. Daniel D'Onfro waited until I could get this particular contract drawn. It came close to about 4 o'clock, and Mr. Ralph D'Onfro and Mr. Daniel D'Onfro came in to see me and they said, "How close are you to finishing this contract?" I said, "Well, it probably"—I had the girl typing it—"it would probably take approximately another hour or an hour and a half." Whereupon they said to me, "It's getting late. We've got a long trip. We've agreed on this thing. Mail us the contract. We'll sign it."

In the interim I had—well, then they left. Mr. Marino came in about an hour or an hour and a half later and said something to the effect to me, "How had I done with the D'Onfros?" I said, "Well,"—

Mr. Solomon: I object, if your Honor please.

Q. This is after the D'Onfros had gone? A. Yes. I turned the contract over to Mr. Marino, and that is the last I saw of any possible part of this transaction until I met the D'Onfros again back in November.

Q. I see. Are you referring now to the visit of Mr. Daniel and Mr. Virgil D'Onfro, that Virgil has just testi-

fied to? A. That's right. The contract I drew, Mr. Cain, was that first contract that was in evidence.

Q. That we have been calling the first draft? [238] A. That's correct.

The Court: We called the two things the first draft. Do you mean Exhibit C?

Mr. Cain: I will identify it.

Mr. Corcoran: Exhibit C as opposed to Exhibit 3 or 4 that the plaintiff put in.

The Court: All right.

Q. Were you in your office at Oyster Bay when Daniel and Virgil arrived on the 10th? A. I was.

Q. Of November? A. Yes, I was.

Q. Tell us what took place with them and what was said? A. I was in the office on the morning of the 10th, and our office at Lizza & Sons consists of two floors, and my office is on the second floor. I happened to walk down the stairs and on to the lower floor, and I saw Mr. D'Onfro and his son in the outer office, and I immediately walked over to Mr. Daniel D'Onfro. I had been very much impressed with him the first time I met him and had taken a liking to him. I walked over and shook hands with him and asked him—

The Court: This is typical lawyer's testimony.

Mr. Corcoran: Isn't it, though?

The Witness: I'm sorry, Judge. My apologies.

A. [Continuing] I walked over and shook hands with Mr. D'Onfro [239] and asked him what he was doing in Oyster Bay. I took him into an office on the main floor, one of the center offices that was then vacant. Mr. D'Onfro stated that he had come to see Mr. Al Lizza. I told him that Mr. Al Lizza was in Cape May. I didn't believe he could possibly get back to see Mr. D'Onfro that day. Mr. D'Onfro was very anxious to see Mr. Lizza. I said, "Well, I will call Mr. Lizza in Cape May and see whether—see

when he is coming back, and if he is coming back today it would be all right perhaps if you wanted to wait, and we could straighten out whatever you wanted straightened out."

I put in a call to Mr. Lizza and spoke to him and Mr. D'Onfro spoke to Mr. Lizza. I spoke to Mr. Lizza, and it was apparent Mr. Lizza was not intending to return until Saturday morning, and I believe they were in on a Thursday morning. Mr. Lizza told me over the telephone—

Mr. Corcoran: Well—

Q. Well, anyway—?

Mr. Corcoran: We are not going to have this, are we?

Mr. Cain: It has been testified to.

Q. Pick up your conversation with him. A. I then spoke to Mr. D'Onfro and Mr. D'Onfro gave me a letter, and this is Daniel D'Onfro. He said, "I have a letter for you, Mr. Gerber. This is for Mr. Lizza. The letter is [240] sealed." He said, "In the event that Al is willing to give me $8,000, then you can tear this letter up, and we can forget about any disagreements that there may be and everybody will be happy."

I turned around to Mr. D'Onfro and said to him, "Mr. D'Onfro, there is no reason that I can see why Mr. Lizza should give you $8,000. We have a contract with you. You are supposed to do this work. You have been delaying doing the work. Why should Mr. Lizza give you $8,000?" Mr. D'Onfro turned around and said, "We are having troubles and we feel we should have this $8,000." He says, "But I have a way that you can make part of the $8,000 back." So I says, "Well, how are we going to get back the $8,000?" He says, "Well, we are buying concrete. If you pay for the concrete in cash you get a deduction of 50 cents a bag. If Mr. Lizza will finance this deal we will split the 50 cents. You get a quarter and I get a quarter.

I turned around to Mr. D'Onfro and said, "That's good business." I said, "I would like to finance a lot of deals like that myself to pick up quarters with someone else paying the tariff for it." I said, "However, this is not my decision to make. I will turn this letter over to Mr. Lizza. I will tell him exactly what you told me, and he will decide whatever there is to be done in this particlar case." Whereupon I shook hands with Mr. D'Onfro, and Mr. D'Onfro left.

[241] Q. Did you see Mr. Lizza later that week? A. I did.

Q. Did Mr. Lizza in your presence open the letter? A. He did.

Q. And read it? A. Yes.

Q. What was the next step that was taken by your office, known to you, in communicating with the D'Onfros? A. I sent D'Onfro—I sent the Hartford Insurance Company and D'Onfro a registered letter in reference to this particular transaction.

Q. And did you send a telegram to D'Onfro? A. I believe I did.

Mr. Cain: Do you have that? It should be dated November 14th.

Mr. Corcoran: Isn't the registered letter enough? I will agree we got it.

Mr. Cain: That is coming in a minute. I do want to put in the immediate response, and the response by telegram ten days later.

Q. I show you what looks like a photostatic copy of a telegram and ask you what it is? A. That is a photostatic copy of a telegram that I received.

Q. Is it not a telegram you sent? A. I'm sorry. It is a telegram that I sent.

[242] Q. To D'Onfro? A. That's right.

Mr. Cain: I offer it.

The Clerk: Defendants' Exhibit 0.

[Photostatic copy of telegram dated November 14, 1955, from Lizza & Sons, Inc. to Daniel D'Onfro & Sons, marked Defendants' Exhibit 0.]

Q. That is dated November 14, Mr. Gerber? A. That's correct.

Q. Did you also send a letter by registered mail to the Hartford Accident & Indemnity Company on the same date? A. I sent them a letter, yes.

Q. Is that it? A. That is it.

Mr. Cain: I offer it.

The Clerk: Defendants' Exhibit P.

[Letter dated November 14, 1955, from Max Gerber to Hartford Accident & Indemnity Company, marked Defendants' Exhibit P.]

Q. This indicates you sent a copy of it to D'Onfro, did you? A. I did.

Mr. Cain: Do you have that? Do you have a copy of that letter?

Mr. Solomon: I don't have the original. I might have.

Mr. Cain: All right.

Q. Did you a week or ten days later send a second telegram [243] to D'Onfro? A. If I can see the telegram?

Q. I show you this telegram and ask you if that is something you know about? A. Yes.

Mr. Cain: I offer it.

Q. Did you send it? A. I sent it.

The Clerk: Defendants' Exhibit Q.

[Telegram dated November 24, 1955, from Max Gerber to Daniel D'Onfro's Sons, Inc. marked Defendants' Exhibit Q.]

Mr. Cain: You may inquire.

Cross-examination by Mr. Corcoran

X-Q. Just to button this up, the letter you are talking about that was delivered to you sealed, you in turn to turn it over to Mr. Lizza, is Exhibit 24? A. Yes.

X-Q. Did there come to your attention an answer to your telegram that we have just talked about, dated November 24th? I show you a letter over the signature, which purports to be, Ralph D. D'Onfro. It merely finishes the sequence of events. A. That is correct. I believe I have the original. What is the date of that, the 24th of November? A. November 25th from Ralph.

[244] Mr. Corcoran: Why don't we put the copy in? It's the same.

Mr. Cain: If this is the one I think it is, I think it is objectionable. I would like to say—it would be my opinion, if your Honor please, to stop.

The Court: Your ground is that it is self-serving?

Mr. Cain: No. My ground is that beginning with this one we have abortive negotiations, which fall in the same category we spoke to your Honor about at the bench.

The Court: What do you say?

Mr. Corcoran: It is my position—I haven't gone along with putting in these telegrams which come after—and this is the finish, this is the end, and it's after this letter that any abortive, as my brother says, negotiations went on.

The Court: Do you want me to look at it?

Mr. Cain: Yes [handing document to the Court].

The Court: It is understood I take this letter limited to a position of D'Onfro as to the past and excluding what it would be willing to do by way of something—

Mr. Cain: Well, may I say something, your Honor?

The Court: Yes.

Mr. Cain: This was after negotiations had commenced, and I had spoken to them.

The Court: That is why I said, I think I better take it in part.

[245] Mr. Corcoran: It goes in with that provision?

The Court: Well, Mr. Cain is considering whether to argue the point.

Mr. Cain: I agree the letter—

The Court: I will take the first, what is it, the first three paragraphs?

Mr. Cain: Yes.

The Court: Is that satisfactory to everybody?

Mr. Corcoran: It is all right as far as I'm concerned, your Honor.

The Clerk: Plaintiff's Exhibit 26.

[First three paragraphs of letter dated November 25, 1955, from Ralph D'Onfro to Lizza & Sons, Inc., marked Plaintiff's Exhibit 26.]

Mr. Cain: I have no further questions.

Mr. Corcoran: No questions, Mr. Gerber.

Mr. Solomon: May it please the Court, at this time, in the absence of Mr. Daniel D'Onfro, who has not appeared during the course of this trial, with Mr. Cain's permission, I would like to present a doctor's certificate as to the reason he is not here.

The Court: Very well. I understand Mr. Cavello is dead, is that right?

Mr. Gerber: That is correct.

[Mr. Solomon hands document to the Court.]

The Court: That may be marked Exhibit AA.

[246] [Certificate from Anthony F. Aloia, M.D., dated November 12, 1956, marked Court Exhibit AA.]

The Court: Are you resting, Mr. Cain?

Mr. Cain: Yes.

The Court: Any rebuttal?

Mr. Corcoran: No, your Honor.

The Court: All right. What is counsel's pleasure as to arguments and briefs and anything else you might have ideas about?

Mr. Corcoran: We wondered if the Court had any suggestions. We have discussed it.

Mr. Cain: We are not in complete agreement on what we want to do.

The Court: Off the record.

[Discussion off the record.]

Note

Page 177 is on Card 4;
Page 178 is blank.

PLAINTIFF'S EXHIBIT NO. 2.

[Letterhead, Daniel D'Onfro's Sons]

BRIDGE QUOTATION — LEE and BECKET

CONTRACT 51-021

Item		*Quantity*		*Unit Price*	*Amount*
A3-1	Bridge Excavation	800	c.y.	5.00	$ 4,000.00
C5-1a	Class A Concrete Footings	1,020	"	25.00	25,500.00
C5-Ic	" " " Pier Shafts	627	"	50.00	21,350.00
C5-1b	" " " Abutments	1,100	"	48.00	52,800.00
C5-1d	" " " Approach Slab	537	"	25.00	13,425.00
C5-1e	" " " Box Culvert	2,680	"	48.00	128,640.00
C5-4a	" D " Bridge Decks	1,360	"	60.00	81,600.00
C5-4b	" " " Headwalls	89	"	60.00	4,390.00
C5-7	Steel Reinforcing Bars	953,600	lbs.		
	(Placing only)			.025	23,840.00
C7-1	Structural Steel	1,673,000	"		
	(Erection and Painting)			.034	56,882.00
C10-1	Dampproofing	2,440	s.y.	.50	1,220.00
C17-1	Rip Rap	3,990	c.y.	8.00	31,920.00
C17-3	Slope Paving	3,970	"	4.00	15,880.00
C20-1-2	Railing	1,950	1 ft.	6.50	6,555.00
C20-4	Aluminum 2 Rail	184	1 ft.	7.50	1,370.00
C20-5	Aluminum 1 Rail	100	1 ft.	6.90	690.00
E3-9	Bridge Anchor Assemblies	16		25.00	400.00
					470,462.00

Note: We have excluded the price for the structural steel and reinforcing bars. Our price is for the erection and painting only. The steel bars for placing.

PLAINTIFF'S EXHIBIT NO. 3.

[Letterhead, Lizza & Sons, Inc.]

July 19, 1955

Daniel D'Onfro Sons
712 Main St.
Leominster,
Massachusetts

Gentlemen:

Enclosed please find original and two (2) copies of contract. I trust same meets with your approval.

In the event it does, will you kindly sign all three (3) copies and mail same back to me. I will have one copy properly executed and return to you.

Very truly yours,

LIZZA & SONS, INC.

By: (s) J. F. MARINO
JOSEPH F. MARINO
Projects Mgr.

JFM:gl
Encl.

PLAINTIFF'S EXHIBIT NO. 4.

AGREEMENT made this 25th day of July, 1955, by and between LIZZA & SONS, INC., of 21-23 Orchard St., Oyster Bay, New York, (hereinafter called the Contractor), and DANIEL D'ONFRO'S SONS, located at 712 Main St., Leominster, Massachusetts, (hereinafter called the Sub-Contractor:)

WHEREAS: This contract is entered into subject to the award by the Massachusetts Turnpike Authority to the Contractor of the General Contract No. 51-021 and is subject to the approval of the qualifications of the Subcontractor by the Massachusetts Turnpike Authority.

WITNESSETH: That the parties hereto in consideration of mutual covenants and promises herein contained hereby contract and agrees as follows:

1. The Subcontractor will furnish all materials and equipment and perform all labor required under Contract No. 51-021 with the Massachusetts Turnpike Authority in accordance with the plans and specifications furnished by the Massachusetts Turnpike Authority. Said work to encompass and include the following specific items as listed on the sheet entitled tabulation of bids June 1st, 1955, furnished by the Massachusetts Turnpike Authority:

Item	*Amt.*	*Description*	*Unit Price*
1. A3-1	800	Bridge Excavation	$5.00 per c.y.
2. C5-1a	1020	Class "A" Cement Concrete Masonry in Footings	25.00 " "
3. C5-1b	1100	Class "A" Cement Concrete Masonry in Abutments and Wingwalls above footings	48.00 " "
4. C5-1c	627	Class "A" Cement Concrete Masonry in Pier Shafts	50.00 " "
5. C5-1d	537	Class "A" Cement Concrete Masonry in Approach Slabs	25.00 " "
6. C5-1e	2680	Class "A" Cement Concrete Masonry in Box Culverts, Flumes and Retaining Wall	48.00 " "
7. C5-1a	1360	Class "D" Cement Concrete Masonry for Bridge Decks	60.00 " "
8. C5-7-953,	600	Steel Reinforcement for Structures (Placing Only)	0.025 per lb.
9. C10-1	2400	Bituminous Damp Proofing	.50 per s.y.
10. C-17-1	3990	Rip Rap	8.00 per c.y.

	Item	*Amt.*	*Description*	*Unit Price*
11.	C-17-3	3970	Slope Paving for Bridges	4.00 per s.y.
12.	C20-2	1950	Aluminum Railing on Concrete 1 Rail (1′-4″ High)	6.50 per l.f.
13.	C20-4	384	Aluminum Railing on Concrete 2 Rails	7.50 " "
14.	C20-5	100	Aluminum Railing on Concrete 1 Rail (1′-3″ High)	6.90 " "
15.	E3-9	16	Bridge Anchor Assemblies	25.00 each

2. All the work done and materials furnished under this contract shall be in accordance with the plans and specifications for said work as furnished by the Massachusetts Turnpike Authority. The Subcontractor has inspected said specifications and plans and agrees that it understands said plans and specifications thoroughly and is agreeable to all the terms and clauses contained therein with no exceptions and accepts the plans and specifications which by reference are made a part hereof so far as they apply to the items listed above. The Subcontractor specifically agrees to conform to the provisions which provides for the progress and time of completion of the project, with this exception that the Sub-Contractor will not be responsible for delays not caused by him.

3. The Subcontractor will furnish to the Contractor a Surety Company's Performance Bond equal to the full amount of this contract. This Bond shall meet with the approval of the Massachusetts Turnpike Authority. All other forms of necessary insurance in accordance with the requirements of the Massachusetts Turnpike Authority shall be provided for by the Subcontractor.

4. The Contractor agrees to pay the Subcontractor $2.00 c.y. for Class "A" Trench Excavation. This Class "A" Trench Excavation is to be done only in the areas pertaining to the items as listed above and to no other part of

the Class "A" Trench Excavation Item. Payment is to be made to the Subcontractor by Cross Sections taken by both parties.

5. The Subcontractor will completely be responsible for all its work and will make any necessary corrections of its work at its own expense, and it also agrees that all of its work will be done by labor forces that are Union Members in good standing and the Subcontractor further agrees that its contracts or agreements necessary in the performance of the work which it is undertaking, will meet with Union requirements prevalent in the area. The Subcontractor further agrees that the work called for hereunder shall be coordinated with the work of the Contractor and such other subcontractors as may be engaged on the over-all project in a manner designed to accomplish the most efficient and economical completion of the entire project; and the Subcontractor further agrees that the work performed by it will be under the general superintendence of the Contractor.

6. The Section Engineers will provide control surveys which includes the furnishing and setting of control stakes and bench marks for lines and grades, the staking of the location of all piers, abutments of bridge structures, together with anchor bolts and bearing surfaces and the location of all culverts and other drainage structures. The Subcontractor agrees that he will be responsible for these stakes and will protect and maintain these stakes and replace any stakes that have been moved, destroyed or knocked out at his own expense. The Subcontractor further agrees that he shall furnish and set from the control stakes and bench marks at his own expense and with his own Engineers all remaining stakes required for the construction operations pertaining to every phase of the items listed above and he shall be solely responsible for the accuracy of his own work.

7. The Contractor agrees to provide access to the Bridge Sites for the Subcontractor.

8. The Subcontractor will be responsible for obtaining all the necessary permits, property agreements and releases and anything else in connection with the items listed above that is outside the right of way limits and is for his convenience in order to prosecute its work.

9. The Subcontractor agrees that it is aware of the fact that there may be a delay in the acquisition of right of way and if so agrees to make no claim against the Contractor for said delays or penalties incurred.

10. The Subcontractor agrees that it will maintain and protect all traffic in connection with its work as outlined in the plans and specifications.

11. The Subcontractor agrees that it will set all Anchor Bolts as called for in the plans and specifications. The said Anchor Bolts covering Items C20-2, C20-4, and C20-5, to be furnished by said Subcontractor and the balance to be furnished and delivered to the job site by others.

12. The payments shall be made upon monthly estimates furnished on such work by the said Section Engineer or other persons in authority of the Massachusetts Turnpike Authority less 10% of the work that shall be inspected, approved, and accepted by such section engineer. Said payment shall be made within 10 days after the Contractor receives payment from the Massachusetts Turnpike Authority for said monthly estimate.

13. That the Contractor and the Subcontractor hereby agrees that when the Contractor has completed his entire work for the Massachusetts Turnpike Authority under Contract No. 51-021, and said Massachusetts Turnpike Authority has made final payment to the Contractor including all retention fees, then the Contractor will pay to the Subcontractor the monies withheld as retained percentages on this

contract less the sum of $8,000.00 which payment shall be the full and final payment under this agreement.

14.(a) That if the Subcontractor, through default on his part, shall fail to complete the work herein prescribed, so as to be finally approved and accepted by the Section Engineer of Massachusetts Turnpike Authority, and if through such failure, the Contractor shall be penalized under his contract with the said duly authorized and constituted officials of the said Massachusetts Turnpike Authority, then, and, in such event, the Subcontractor shall reimburse the Contractor for any sum or sums of money that the Contractor shall rightfully pay to the duly authorized and constituted officials of the Massachusetts Turnpike Authority because of such default of the Subcontractor.

14. (b) That if the Subcontractor, after starting the work herein contracted for, shall refuse to carry on, then all moneys withheld by the Contractor for him, as hereinbefore provided, shall be forfeited to the Contractor by the Subcontractor as liquidated damages therefore.

14. (c) That the provisions contained in the two preceding paragraphs of this contract shall not be deemed or construed to deprive the Contractor of his right to elect to sue the Subcontractor for any damages that such breach may cause him.

15. (d) That if it shall become necessary for the Contractor, by action, to enforce the collection of any sum or sums of moneys under this agreement, the Subcontractor shall pay to the Contractor all necessary expenses, including a reasonable attorney's fee, that the Contractor may incur in the institution, or prosecution, of any such action.

In Witness Whereof, Lizza & Sons, Inc., has caused this agreement to be executed by its proper officers and its corporate seal to be hereunto affixed and the Daniel D'Onfro's Sons, has caused this agreement to be executed

by its proper officers and its corporate seal to be hereunto affixed the day and year first above written.

LIZZA & SONS, INC.

By: .....

Attest: .....

DANIEL D'ONFRO'S SONS

By: .....

Attest: .....

Note

Page 187 is on Card 4;
Page 188 is blank

PLAINTIFF'S EXHIBIT NO. 6.

Plaintiff's exhibit 6, being identical to the Contract Bond in Plaintiff's exhibit 25 (except that the amount thereof is $300,000), is here omitted. Plaintiff's exhibit 25 appears at p. 212.

PLAINTIFF'S EXHIBIT NO. 7.

Plaintiff's exhibit 7, being identical to the Contract Bond in Plaintiff's exhibit 25 (except that the amount thereof is $320,000), is here omitted. Plaintiff's exhibit 25 appears at p. 212.

PLAINTIFF'S EXHIBIT NO. 8.

AGREEMENT made this 3rd day of August 1955, by and between LIZZA & SONS, INC., of 21-23 Orchard St., Oyster Bay, New York, (hereinafter called the Contractor), and DANIEL D'ONFRO'S SONS, located at 712 Main St., Leominster, Massachusetts, (hereinafter called the Subcontractor:)

WHEREAS: This contract is entered into subject to the award by the Massachusetts Turnpike Authority to the Contractor of the General Contract No. 51-021 and is subject to the approval of the qualifications of the subcontractor by the Massachusetts Turnpike Authority.

WITNESSETH; That the parties hereto in consideration of mutual covenants and promises herein contained hereby contract and agree as follows:

1. The Subcontractor will furnish all materials and equipment and perform all labor required under Contract No. 51-021 with the Massachusetts Turnpike Authority in accordance with the plans and specifications furnished by the Massachusetts Turnpike Authority. Said work to encompass and include the following specific items as listed on the sheet entitled tabulation of bids June 1st, 1955, furnished by the Massachusetts Turnpike Authority:

	Item	*Amt.*	*Description*	*Unit Price*
1.	A3-1	800	Bridge Excavation	$5.00 per c.y.
2.	C5-1a	1020	Class "A" Cement Concrete Masonry in Footings	25.00 " "
3.	C5-1b	1100	Class "A" Cement Concrete Masonry in Abutments and Wingwalls above footings	48.00 " "
4.	C5-1c	627	Class "A" Cement Concrete Masonry in Pier Shafts	50.00 " "
5.	C5-1d	537	Class "A" Cement Concrete Masonry in Approach Slabs	25.00 " "
6.	C5-1e	2680	Class "A" Cement Concrete Masonry in Box Culverts, Flumes and Retaining wall	48.00 " "
7.	C5-1a	1360	Class "D" Cement Concrete Masonry for Bridge Decks	60.00 " "
8.	C5-7-953	600	Steel Reinforcement for Structures (Placing Only)	0.025 per lb.
9.	C10-1	2440	Bituminous Damp Proofing	.50 per s.y.
10.	C-17-1		Rip Rap	8.00 per c.y.
			Stone for said Rip Rap to be furnished by the Contractor and to be delivered at the site of the work to be done, it being understood that said work shall be in connection only with the construction of box culverts and bridge structure	

Item	*Amt.*	*Description*	*Unit Price*
11. C-17-3	3970	Slope Paving for Bridges. Stone to be furnished by the contractor and to be delivered at the site of the work to be done. Fine grading for the slope paving to be done by the Contractor	4.00 per s.y.
12. C20-2	1950	Aluminum Railing on Concrete Rail (1' - 4" High)	6.50 per l.f.
13. C20-4	384	Aluminum Railing on Concrete 2 Rails	7.50 " "
14. C20-5	100	Aluminum Railing on Concrete 1 Rail (1' - 3" High)	6.90 " "
15. E3-9	16	Bridge Anchor Assemblies	25.00 each

2. All the work done and materials furnished under this contract shall be in accordance with the plans and specifications for said work as furnished by the Massachusetts Turnpike Authority. The Subcontractor has inspected said specifications and plans and agrees that it understands said plans and specifications thoroughly and is agreeable to all the terms and clauses contained therein with no exceptions and accepts the plans and specifications which by reference are made a part hereof so far as they apply to the items listed above. The Subcontractor specifically agrees to conform to the provisions which provides for the progress and time completion of the project, provided, however, that the said Subcontractor shall not be responsible for any delays caused by striking, shortage of cement or any other delays not caused by him.

3. The Subcontractor will furnish to the Contractor a Surety Company's Performance Bond equal to the full amount of this contract. This Bond shall meet with the

approval of the Massachusetts Turnpike Authority. All other forms of necessary insurance in accordance with the requirements of the Massachusetts Turnpike Authority shall be provided for by the Subcontractor.

4. The Contractor agrees to pay the Subcontractor $2.00 c.y. for Class "A" Trench Excavation. This Class "A" Trench Excavation is to be done only in the areas pertaining to the items as listed above and to no other part of the Class "A" Trench Excavation Item. Payment is to be made to the Subcontractor by Cross Sections taken by both parties.

5. The Subcontractor will completely be responsible for all its work and will make any necessary corrections of its work at its own expense, and it also agrees that all of its work will be done by labor forces that are Union Members in good standing and the Subcontractor further agrees that its contracts or agreements necessary in the performance of the work which it is undertaking, will meet with Union requirements prevalent in the area. The Subcontractor further agrees that the work called for hereunder shall be coordinated with the work of the Contractor and such other subcontractors as may be engaged on the over-all project in a manner designed to accomplish the most efficient and economical completion of the entire project; and the Subcontractor further agrees that the work performed by it will be under the general superintendence of the Contractor.

6. The Section Engineers will provide control surveys which includes the furnishing and setting of control stakes and bench marks for lines and grades, the staking of the location of all piers, abutments of bridge structures, together with anchor bolts and bearing surfaces and the location of all culverts and other drainage structures. The Subcontractor agrees that he will be responsible for these stakes and will protect and maintain these stakes and replace any stakes that have been moved, destroyed or knocked out at

his own expense. The Subcontractor further agrees that he shall furnish and set from the control stakes and bench marks at his own expense and with his own Engineers all remaining stakes required for the construction operations pertaining to every phase of the items listed above and he shall be solely responsible for the accuracy of his own work.

7. The Contractor agrees to provide access to the Bridge Sites for the Subcontractor.

8. The Subcontractor will be responsible for obtaining all the necessary permits, property agreements and releases and anything else in connection with the items listed above that is outside the right of way limits and is for his convenience in order to prosecute its work.

9. The Subcontractor agrees that it is aware of the fact that there may be a delay in the acquisition of right of way and if so agrees to make no claim against the Contractor for said delays.

10. The Subcontractor agrees that it will maintain and protect all traffic in connection with its work as outlined in the plans and specifications.

11. The Subcontractor agrees that it will set all Anchor Bolts covering and required by Items C20-2, C20-4, and C20-5 in accordance with plans and specifications, said Anchor Bolts to be furnished by the said Subcontractor. Any and all other Anchor Bolts to be furnished and set by others.

12. The payments shall be made upon monthly estimates furnished on such work by the said Section Engineer or other persons in authority of the Massachusetts Turnpike Authority less 10% of the work that shall be inspected, approved, and accepted by such section engineer. Said payment shall be made within 10 days after the Contractor receives payment from the Massachusetts Turnpike Authority for said monthly estimate.

13. That the Contractor and the Subcontractor hereby agrees that when the Contractor has completed his entire

work for the Massachusetts Turnpike Authority under Contract No. 51-021, and said Massachusetts Turnpike Authority has made final payment to the Contractor including all retention fees, then the Contractor will pay to the Subcontractor the monies withheld as retained percentages on this contract less the sum of $8,000.00 which payment shall be the full and final payment under this agreement.

14. (a) That if the Subcontractor, through default on his part, shall fail to complete the work herein prescribed, so as to be finally approved and accepted by the Section Engineer of Massachusetts Turnpike Authority, and if through such failure, the Contractor shall be penalized under his contract with the said duly authorized and constituted officials of the said Massachusetts Turnpike Authority, then, and, in such event, the Subcontractor shall reimburse the Contractor for any sum of money that the Contractor shall rightfully pay to the duly authorized and constituted officials of the Massachusetts Turnpike Authority because of such default of the Subcontractor.

14. (b) That if the Subcontractor, after starting the work herein contracted for, shall refuse to carry on, then all moneys withheld by the Contractor for him, as hereinbefore provided, shall be forfeited to the Contractor by the Subcontractor as liquidated damages therefore.

In Witness Whereof, Lizza & Sons, Inc., has caused this agreement to be executed by its proper officers and its corporate seal to be hereunto affixed and the Daniel D'Onfro's Sons, has caused this agreement to be executed by its proper officers and its corporate seal to be hereunto affixed the day and year first above written.

Lizza & Sons, Inc.

By: .....

Attest:

Daniel D'Onfro's Sons

By: (s) Daniel A. D'Onfro

Attest: (s) Dorothy I. D'Onfro

PLAINTIFF'S EXHIBIT NO. 9.

[Letterhead, Lizza & Sons, Inc.]

August 16th, 1955

Daniel D'Onfro's Sons
712 Main Street
Leominster, Massachusetts

Re: Contract 51-021 Lee-Becket
Massachusetts Turnpike Authority

Gentlemen:

We are in receipt of your letter of July 25th, 1955 together with your signed copies of proposed agreement between us.

It is our understanding that your organization is a co-partnership of several members. We ask that you provide us with a notarized acknowledgement or affidavit indicating that the signing partner is authorized to bind and commit the entire partnership in this particular undertaking.

Upon receipt of the above the proposal will be processed for final execution.

Your early consideration will be appreciated.

Very truly yours,

LIZZA & SONS, INC.

By: (s) E. S. PELZER
E. S. PELZER, *General Manager*

ESP:ea

PLAINTIFF'S EXHIBIT NO. 10.

[Letterhead, Daniel D'Onfro's Sons]

August 18, 1955

Lizza & Sons, Inc.
Oyster Bay, N. Y.

Re: Contract 51-021 Lee - Becket.

Gentlemen:

Acknowledge receipt of your letter of August 16th.

Kindly return by return mail the three copies of agree-

ment and we will properly execute them and return same to you.

Very truly yours,
DANIEL D'ONFRO'S SONS
By (s) DANIEL D'ONFRO
DANIEL D'ONFRO

PLAINTIFF'S EXHIBIT NO. 11.

[Letterhead, Lizza & Sons, Inc.]

August 23rd, 1955

Daniel D'Onfro's Sons
712 Main Street
Leominster, Massachusetts
Att: Mr. Daniel D'Onfro
Re: Contract 51-021 Lee-Beckett, Massachusetts
Gentlemen:

Thank you for your letter of August 18th, 1955 regarding subject contract.

Copies of the proposed agreement between us is presently in the hands of our Mr. Joe Marino for execution and hence cannot, at this time be returned to you.

All that we require now is acknowledgement by all of the several partners of your organization: That you, Daniel D'Onfro, are authorized to act for and commit the other partners to the agreement in this instance. This can be in the form of a notarized statement or affidavit.

Very truly yours,
LIZZA & SONS, INC.
By: (s) E. S. PELZER
E. S. PELZER, *General Manager*

ESP:ea

PLAINTIFF'S EXHIBIT NO. 12.

[Letterhead, Daniel D'Onfro's Sons]

August 30, 1955

Lizza & Sons, Inc.
Oyster Bay, New York.

Re: Contract 51-021 Massachusetts Turnpike Authority, Lee-Becket.

Gentlemen:

We are displeased with the delay in starting work on our sub-contract. We understand from your Lee office that the reinforcing steel will be on the job the latter part of September. You should realize the best part of 1955 has gone and during the winter it is impossible to make satisfactory progress with concrete construction; therefore it is impossible to say the work will be completed by September 30, 1956, as specified by the Massachusetts Turnpike Authority.

We request your company to execute our sub-contract agreement including our letter of August 29, 1955, which we herewith deliver in person to your company at your Lee office, August 30, 1955. We request the executed contract and letter be returned to us not later than September 3, 1955.

If the agreement fails to be in our hands on that date we ask all the transactions in regard to the sub-contract agreement with your company be cancelled and void without liability to both parties, Lizza & Sons, Inc., or Daniel D'Onfro's Sons.

Very truly yours,

DANIEL D'ONFRO'S SONS

By (s) RALPH D'ONFRO

RALPH D'ONFRO

PLAINTIFF'S EXHIBIT NO. 13.

[Letterhead, Lizza & Sons, Inc.]

August 30, 1955

Daniel D'Onfro's Sons
712 Main Street
Leominster, Massachusetts

Re: Contract 51-021 Lee-Becket, Massachusetts Turnpike Authority

Att: Mr. Ralph D'Onfro

Dear Sir:

In conformity with instructions of our Mr. Joseph Marino and your request of August 26, 1955, we are returning the contract, in three counterparts, which you forwarded to us.

We will appreciate return of the contracts for final execution upon your proper completion.

Very truly yours,

LIZZA & SONS, INC.

By: (s) E. S. PELZER

E. S. PELZER, *General Manager*

ESP:gl

cc/ Joseph Marino
P.O. 375, Lee, Mass.
Cape May, New Jersey

PLAINTIFF'S EXHIBIT NO. 14.

AGREEMENT made this twenty-seventh day of July, 1955, by and between LIZZA & SONS, INC., of 21-23 Orchard St., Oyster Bay, New York, (hereinafter called the Contractor), and DANIEL D'ONFRO'S SONS, located at 712 Main St., Leominster, Massachusetts, (hereinafter called the Subcontractor:)

WHEREAS: This contract is entered into subject to the award by the Massachusetts Turnpike Authority to the Contractor of the General Contract No. 51-021 and is sub-

ject to the approval of the qualifications of the Subcontractor by the Massachusetts Turnpike Authority.

WITNESSETH; That the parties hereto in consideration of mutual covenants and promises herein contained hereby contract and agree as follows:

1. The Subcontractor will furnish all materials and equipment and perform all labor required under Contract No. 51-021 with the Massachusetts Turnpike Authority in accordance with the plans and specifications furnished by the Massachusetts Turnpike Authority. Said work to encompass and include the following specific items as listed on the sheet entitled tabulation of bids June 1st, 1955, furnished by the Massachusetts Turnpike Authority:

Item	*Amt.*	*Description*	*Unit Price*
1. A3-1	800	Bridge Excavation	$5.00 per c.y.
2. C5-1a	1020	Class "A" Cement Concrete Masonry in Footings	25.00 " "
3. C5-1b	1100	Class "A" Cement Concrete Masonry in Abutments and Wingwalls above footings	48.00 " "
4. C5-1c	627	Class "A" Cement Concrete Masonry in Pier Shafts	50.00 " "
5. C5-1d	537	Class "A" Cement Concrete Masonry in Approach Slabs	25.00 " "
6. C5-1e	2680	Class "A" Cement Concrete Masonry in Box Culverts, Flumes and Retaining wall	48.00 " "
7. C5-1a	1360	Class "D" Cement Concrete Masonry for Bridge Decks	60.00 " "

Item	*Amt.*	*Description*	*Unit Price*
8. C5-7-953	600	Steel Reinforcement for Structures (Placing Only)	0.025 per lb.
9. C10-1	2440	Bituminous Damp Proofing	.50 per s.y.
10. C-17-3	3970	Slope Paving for Bridges. ~~Stone to be furnished by the contractor and to be delivered at the site of the work to be done. Fine grading for the slope paving to be done by the Contractor.~~	3.00 per s.y.
11. C-20-2	1950	Aluminum Railing on Concrete Rail (1′ - 4″ High)	6.50 per l.f.
12. C20-4	384	Aluminum Railing on Concrete 2 Rails	7.50 " "
13. C20-5	100	Aluminum Railing on Concrete 1 Rail (1′ - 3″ High)	6.90 " "
14. E3-9	16	Bridge Anchor Assemblies	25.00 each

2. All the work done and materials furnished under this contract shall be in accordance with the plans and specifications for said work as furnished by the Massachusetts Turnpike Authority. The Subcontractor has inspected said specifications and plans and agrees that it understands said plans and specifications thoroughly and is agreeable to all the terms and clauses contained therein with no exceptions and accepts the plans and specifications which by reference are made a part hereof so far as they apply to the items listed above. The Subcontractor specifically agrees to conform to the provisions which provides for the progress and time completion of the project, provided, however, that the said Subcontractor shall not be responsible for any delays caused by striking, shortage of cement or any other delays not caused by him.

3. The Subcontractor will furnish to the Contractor a Surety Company's Performance Bond equal to the full amount of this contract. This Bond shall meet with the approval of the Massachusetts Turnpike Authority. All

other forms of necessary insurance in accordance with the requirements of the Massachusetts Turnpike Authority shall be provided for by the Subcontractor.

4. The Subcontractor will completely be responsible for all its work and will make any necessary corrections of its work at its own expense, and it also agrees that all of its work will be done by labor forces that are Union Members in good standing and the Subcontractor further agrees that its contracts or agreements necessary in the performance of the work which it is undertaking, will meet with Union requirements prevalent in the area. The Subcontractor further agrees that the work called for hereunder shall be coordinated with the work of the Contractor and such other subcontractors as may be engaged on the over-all project in a manner designed to accomplish the most efficient and economical completion of the entire project; and the Subcontractor further agrees that the work performed by it will be under the general superintendence of the Contractor.

5. The Section Engineers will provide control survey which includes the furnishing and setting of control stakes and bench marks for lines and grades, the staking of the location of all piers, abutments of bridge structures, together with anchor bolts and bearing surfaces and the location of all culverts and other drainage structures. The Subcontractor agrees that he will be responsible for these stakes and will protect and maintain these stakes and replace any stakes that have been moved, destroyed or knocked out at his own expense. The Subcontractor further agrees that he shall furnish and set from the control stakes and bench marks at his own expense and with his own Engineers all remaining stakes required for the construction operations pertaining to every phase of the items listed above and he shall be solely responsible for the accuracy of his own work.

6. The Contractor agrees to provide access to the Bridge Sites for the Subcontractor.

7. The Subcontractor will be responsible for obtaining all the necessary permits, property agreements and releases and anything else in connection with the items listed above that is outside the right of way limits and is for his convenience in order to prosecute its work.

8. The Subcontractor agrees that it is aware of the fact that there may be a delay in the acquisition of right of way and if so agrees to make no claim against the Contractor for said delays.

9. The Subcontractor agrees that it will maintain and protect all traffic in connection with its work as outlined in the plans and specifications.

10. The Subcontractor agrees that it will set all Anchor Bolts covering and required by Items C20-2, C20-4, and C20-5 in accordance with plans and specifications, said Anchor Bolts to be furnished by the said Subcontractor. Any and all other Anchor Bolts to be furnished and set by others.

11. The payments shall be made upon monthly estimates furnished on such work by the said Section Engineer or other persons in authority of the Massachusetts Turnpike Authority less 10% of the work that shall be inspected, approved, and accepted by such section engineer. Said payment shall be made within 10 days after the Contractor receives payment from the Massachusetts Turnpike Authority for said monthly estimate.

12. That the Contractor and the Subcontractor hereby agrees that when the Contractor has completed his entire work for the Massachusetts Turnpike Authority under Contract No. 51-021, and said Massachusetts Turnpike Authority has made final payment to the Contractor including all retention fees, then the Contractor will pay to the Subcontractor the monies withheld as retained percentages on this contract less the sum of $8,000.00 which payment shall be the full and final payment under this agreement.

13. Whereas work on said Contract has not as of this date been commenced, and

Whereas failure to commence said work is in no way caused by Daniel D'Onfro's Sons, and

Whereas General Contract No. 51-021 provides for work to be fully completed on or before September 30, 1956, and

Whereas both parties hereto desire to comply with the terms of said contract,

Now Therefore, it is agreed as follows:—

In the event Lizza Company or its agents shall perform any work for Daniel D'Onfro's Sons as designated in contract between the parties hereto—the Lizza Company or its agents shall be paid the same unit price as stipulated in the agreement between the parties—payment to be made by deducting value of said work from gross amount of contract between parties.

14. That if the Subcontractor, after starting the work herein contracted for, shall refuse to carry on, then all moneys withheld by the Contractor for him, as hereinbefore provided, shall be forfeited to the Contractor by the Subcontractor as liquidated damages therefore.

In Witness Whereof, Lizza & Sons, Inc., has caused this agreement to be executed by its proper officers and its corporate seals to be hereunto affixed and the Daniel D'Onfro's Sons, has caused this agreement to be executed by its proper officers and its corporate seal to be hereunto affixed the day and year first above written.

Lizza & Sons, Inc.

By (s) Elia E. Lizza, *Pres.*

Attest: (s) E. S. Pelzer

(s) Daniel D'Onfro's Sons

(s) Ralph D. D'Onfro

(s) Emanuel D. D'Onfro

(s) Virgil D. D'Onfro

In the presence of: (s) Nicholas A. D'Onfro

(s) Dorothy I. D'Onfro

PLAINTIFF'S EXHIBIT NO. 15.

[Letterhead, Lizza & Sons, Inc.]

September 14, 1955

Daniel D'Onfro's Sons
712 Main Street,
Leominster, Mass.
Attention: Mr. D'Onfro
Re: Contract 51-021, Massachusetts Turnpike
Lee-Becket

Gentlemen:

Re contract re-typed by you and submitted to us by Mr. D'Onfro, Senior, by hand.

Please be advised that we notice that you have deleted Item C17-1 Rip Rap from this contract without our consent. Your original quotation submitted to us contained this item as per specification requirements. We now wish to advise you after verbal conversation with you that this item has been deleted from your contract by us and given to the drainage contractor.

We also wish to call your attention to the addition you have made to Item C17-3, Slope Paving for Bridges, in that you state that we, Lizza & Sons Inc., are to supply the stone needed for this item. May we remind you that in your original quotation you quoted this item as per specification requirements. The only conversation concerning supply of stone was in connection with Rip Rap which has been deleted from your contract. No mention was ever made concerning Slope Paving for Bridges.

Very truly yours,
(s) J. F. Marino
Joseph F. Marino
Project Manager

JFM:rad

PLAINTIFF'S EXHIBIT NO. 16.

Sept. 19, 1955

Lizza & Sons, Inc.
P. O. Box 375
Lee, Mass.

Re: Contract 51-021, Mass. Turnpike Authority Lee-Becket.

Attn: Mr. J. F. Marino

Dear Sir:

Before we prepared our proposal for the Lee job, we took in consideration that if you were the successful bidder we would order a truck crane and purchase sufficient plywood and start work about June 25, 1955. To date we haven't an executed agreement.

For reasons beyond our control practically four months have gone by and no work has been done on the structures.

We want to make it clear that Daniel D'Onfro's Sons shall in no event be responsible for any penalties or other charges, except the payment of $8,000.00 referred to in the agreement.

For the reason stated above, you may sub-let the slope paving to the same concern you gave the rip rap to.

Very truly yours,
DANIEL D'ONFRO'S SONS
By
RALPH D. D'ONFRO.

PLAINTIFF'S EXHIBIT NO. 17.

[Letterhead, Lizza & Sons, Inc.]

September 23, 1955

Daniel D'Onfro's Sons
712 Main Street,
Leominster, Mass.

Attention: Mr. R. D'Onfro

Re: Contract 51-021, Massachusetts Turnpike, Lee-Becket

Gentlemen:

We are in receipt of your letter dated September 19, 1955.

Please be advised that the time that has been lost on this contract is through no fault of ours. We are waiting for the Authority to approve you as sub contractor for Structures. Incidentally, the time actually gone by is not four months as you state for this reason, the job was let on June 1, 1955—the Authority can award this job 30 days after letting which makes it July 1, 1955. They then require 10 days to sign and execute the contract making it July 11, 1955. Therefore, in view of the above we cannot see how you could have started your work on June 25th. We expect an extension of time due to the Authority's delay in approval which will be automatically granted to you.

As for your last paragraph, we wish to advise you that this item C17-3 as quoted by you cannot be sublet to anyone else. Your quotation for this item to be done per plan and specification will have to remain in your contract as originally quoted.

Very truly yours,
(s) J. F. Marino
Joseph F. Marino
Project Manager

JFM:rad

PLAINTIFF'S EXHIBIT NO. 18.

[Letterhead, Lizza & Sons, Inc.]

September 27, 1955

Daniel D'Onfro's Sons
712 Main Street,
Leominster, Mass.

Attention: Mr. D'Onfro

Re: Contract 51-021, Massachusetts Turnpike, Lee-Becket

Gentlemen:

This will confirm our telephone call on September 26, 1955 advising you that you were approved as sub-contractor to do work on the above mentioned project by the Massachusetts Turnpike Authority.

Please place all necessary material orders etc. in connection with your work so that work can be started without further delay. Forward as soon as possible to our main office any and all insurances required plus detailed schedule of your operations.

An executed copy of the contract is being mailed out to you immediately.

Very truly yours,
(s) J. F. MARINO
JOSEPH F. MARINO
Project Manager

JFM:rad

PLAINTIFF'S EXHIBIT NO. 19.

[Letterhead, Lizza & Sons, Inc.]

September 29, 1955

Daniel D'Onfro's Sons
712 Main Street
Leominster, Massachusetts

Re: Contract #51-021 Lee-Beckett
Mass. Tpke. Auth.

Gentlemen:

Enclosed find original and duplicate of agreement between us in connection with referenced contract.

The agreement is completely executed except for the initialing by your partners of the correction on page two (2) of the agreement. This change is in accordance with your original quotation and with letter dated 9-14-55 of our Mr. J. F. Marino.

Upon initialing by all partners of your concern kindly return original of contract to us.

Your attention is directed to Article 46 of the Standard Specifications covering insurance requirements. It is requested that you supply the necessary certificates (in duplicate) to us at your very earliest convenience.

Very truly yours,
LIZZA & SONS, INC.
By (s) E. S. PELZER
E. S. PELZER
General Manager

ESP/tb
Encl.
cc J. F. Marino

PLAINTIFF'S EXHIBIT NO. 20.

October 4, 1955

Lizza & Sons, Inc.
P. O. Box 375
Lee, Mass. Re: Contract 51-021, Lee-Becket.
Attn: Mr. J. F. Marino.
Dear Sir:

October 3, 1955, we received two prints of agreement out of three signed by Lizza & Sons, Inc., but they have not affixed the corporation seal.

Some modification was made on the Slope Paving Item, by crossing out furnishing the stone and grading. We want this item to remain as it was or eliminate it entirely from the agreement.

Return the third copy of agreement so we can correct it and we will deliver the three in person to Oyster Bay, New York for final execution.

Very truly yours,
DANIEL D'ONFRO'S SONS
By
RALPH D. D'ONFRO.

PLAINTIFF'S EXHIBIT NO. 21.

[Letterhead, Lizza & Sons, Inc.]

October 11, 1955

Daniel D'Onfro's Sons
712 Main Street
Leominster, Mass.
Re: Contract 51-021
Mass. Tpke. Lee-Beckett
Att: Mr. R. D'Onfro
Gentlemen:

We are in receipt of your letter dated October 4, 1955.

Please be advised that we are waiting the return of one copy of the executed contract.

Our letter dated September 14, 1955 clearly states that this item C17-3 slope paving for bridges is to stay in the contract as quoted by you originally June 2, 1955. You will also recall that these item prices quoted by you were used by us in the bid.

We expect you to start work as soon as possible on the box culverts which is vital to the progress of the rest of the job. Please contact our Mr. Thomas at our Lee office concerning steel deliveries and schedules.

Very truly yours,
LIZZA & SONS, INC.
(s) J. F. MARINO
J. F. MARINO
Projects Manager

JFM/tb

cc Lee Office
Main Office
My File

PLAINTIFF'S EXHIBIT NO. 22.

[Letterhead, Daniel D'Onfro's Sons]

October 13, 1955

Lizza & Sons
P. O. Box 375
Lee, Mass.
Att'n: Mr. J. Marino.
Dear Sir:

At your request we herewith return one copy of contract.

Very truly yours,
DANIEL D'ONFRO'S SONS
By (s) RALPH D. D'ONFRO
RALPH D. D'ONFRO

PLAINTIFF'S EXHIBIT NO. 23.

[Letterhead, Daniel D'Onfro's Sons]

October 19, 1955

Lizza & Sons, Inc.
Lee, Mass.

Gentlemen:

Before we can start the construction of the concrete culverts on your Lee contract you must have them graded to the proposed elevation, in order for us to lay the reinforcing steel for the concrete floors.

You must remove to the original grade the excavated material which you have piled up on the easterly side of the culvert at Sta. 122, in order that the crane and cement trucks can operate along the culvert. The water from the existing concrete culvert at Sta. 122 must be diverted.

Very truly yours,

DANIEL D'ONFRO'S SONS

By (s) DANIEL D'ONFRO

DANIEL D'ONFRO

PLAINTIFF'S EXHIBIT NO. 24.

[Letterhead, Daniel D'Onfro's Sons]

November 9, 1955

Lizza & Sons, Inc.
Oyster Bay, New York

Re: Contract No. 51-021—Lee & Becket
Massachusetts Turnpike Authority.

Gentlemen:

Since July 27, 1955, the date that the contract was executed between you and this company, Daniel D'Onfro's Sons, we have been ready and willing to commence performance of that agreement relative to the construction of bridges and culverts on the job in Lee, Massachusetts. This we have been prevented from doing, through no fault

of our own, and for reasons unknown to us, but obviously known to you.

According to a work schedule submitted to us by you indicating that you had prepared the job site for construction by us we were to have commenced work on October 15th. On that date, namely October 15, 1955, we appeared at the job site and observed that nothing had been done by you by way of preparation in order that we could properly commence our work.

On October 19th we again visited the job site and found that nothing had been done in order that we could properly proceed in performance of our contract and on that day, we made an appointment with the district engineer of the toll road and your employee, Mr. Thomas, for a conference on October 20, 1955. On that day Mr. Thomas guaranteed to us, in the presence of the state engineer, that we would definitely commence work on Monday, October 24th and as a result of this representation we moved all of our equipment and employees to the job site and were ready, willing and able to commence work on October 24th.

• • •

(s) RALPH D. D'ONFRO

PLAINTIFF'S EXHIBIT NO. 25.

HARTFORD ACCIDENT AND INDEMNITY COMPANY
Hartford, Connecticut
A Stock Company
CONTRACT BOND

KNOW ALL MEN BY THESE PRESENTS,

That, Daniel A. D'Onfro, Ralph D. D'Onfro, Emanuel D. D'Onfro, Virgil D. D'Onfro and Nicholas A. D'Onfro copartners dba Daniel D'Onfro's Sons Leominster, Massachusetts (hereinafter called the Principal), as Principal, and the HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation organized and existing under the laws of the

State of Connecticut with its principal office in the City of Hartford, Connecticut and having an usual place of business at Fitchburg, Massachusetts (hereinafter called the Surety), as Surety, are held and firmly bound unto Lizza & Sons, Inc., 21-23 Orchard Street, Oyster Bay, New York (hereinafter called the Obligee), in the just and full sum of Three Hundred Ninety-Two Thousand Six Hundred Ten Dollars, to the payment of which sum, well and truly to be made, the said Principal and Surety bind themselves, and their respective heirs, administrators, executors, successors and assigns, jointly and severally, firmly by these presents.

Whereas, the Principal has entered into a certain written contract with the Obligee, dated the 26th day of July 1955 to furnish all materials and equipment and perform all labor required under Contract No. 51-021 Massachusetts Turnpike Authority which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.

Now, Therefore, the condition of this obligation is such that, if the Principal shall faithfully perform the contract on his part, and shall fully indemnify and save harmless the Obligee from all cost and damage which the Obligee may suffer by reason of failure so to do and shall fully reimburse and repay the Obligee all outlay and expense which the Obligee may incur in making good any such default, and shall pay all persons who have contracts directly with the Principal for labor or materials, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

Provided, However, it shall be a condition precedent to any right of recovery hereunder that, in the event of any default on the part of the Principal, a written statement of the particular facts showing the date and nature of such default shall be immediately given by the Obligee to the

Surety and shall be forwarded by registered mail to the Surety at its Home Office in the City of Hartford, Connecticut.

And Provided Further, that no action, suit or proceeding, except as hereinafter set forth, shall be had or maintained against the Surety on this instrument unless the same be brought or instituted and process served upon the Surety within twelve months after completion of the work mentioned in said contract, whether such work be completed by the Principal, Surety or Obligee; but if there is any maintenance or guarantee period provided in the contract for which said Surety is liable, an action for maintenance may be brought within six months from the expiration of the maintenance period, but not afterwards.

In Witness Whereof, the said Principal and Surety have signed and sealed this instrument this 26th day of July 1955.

Daniel A. D'Onfro, Ralph D. D'Onfro, Emanuel D. D'Onfro, Virgil D. D'Onfro and Nicholas A. D'Onfro co-partners dba Daniel D'Onfro's Sons (Seal)

HARTFORD ACCIDENT AND INDEMNITY COMPANY

(s) JOHN E. LUKENS

By: JOHN E. LUKENS

Attest: *Attorney-in-fact*

HARTFORD ACCIDENT AND INDEMNITY COMPANY
Hartford, Connecticut
POWER OF ATTORNEY

Know all men by these Presents, That the HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, does hereby make, con-

stitute and appoint JOHN E. LUKENS, of HARTFORD, CONNECTICUT, its true and lawful Attorney(s)-in-fact, with full power and authority to each of said Attorney(s)-in-fact, in their separate capacity if more than one is named above, to sign, execute and acknowledge any and all bonds and undertakings and other writings obligatory in the nature thereof on behalf of the company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states and municipalities, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed, and to bind the HARTFORD ACCIDENT AND INDEMNITY COMPANY thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an Executive Officer of the HARTFORD ACCIDENT AND INDEMNITY COMPANY and sealed and attested by one other of such officers, and hereby ratifies and confirms all that its said Attorney(s)-in-fact may do in pursuance hereof.

This power of attorney is granted under and by authority of the following By-Law adopted by the Stockholders of the HARTFORD ACCIDENT AND INDEMNITY COMPANY at a meeting duly called and held on the 10th day of February, 1943.

ARTICLE IV

SECTION 8. The President or any Vice-President, acting with any Secretary or Assistant Secretary, shall have power and authority to appoint, for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact and at any time to remove any such Resident Vice-

President, Resident Assistant Secretary, or Attorney-in-fact, and revoke the power and authority given to him.

SECTION 11. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute and deliver on behalf of the Company and to attach the seal of the Company thereto any and all bonds and undertakings, and other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the Company as if signed by an Executive Officer and sealed and attested by one other of such Officers.

This power of attorney is signed and sealed by facsimile under and by the authority of the following Resolution adopted by the Directors of the HARTFORD ACCIDENT AND INDEMNITY COMPANY at a meeting duly called and held on the 14th day of September, 1954.

RESOLVED, that, whereas the President or any Vice-President, acting with any Secretary or Assistant Secretary, has the power and authority to appoint by a power of attorney, for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Assistant Secretaries and Attorneys-in-fact;

Now therefore the signatures of such officers and the seal of the Company may be affixed to any such power of attorney by a facsimile, and any such power of attorney bearing such facsimile signatures or seal shall be valid and binding upon the Company.

In Witness Whereof, the HARTFORD ACCIDENT AND INDEMNITY COMPANY has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Secretary, this 25th day of February, 1955.

HARTFORD ACCIDENT AND INDEMNITY

(s) W. H. WALLACE

Attest: [SEAL] *Vice-President*

(s) C. W. O'DOWD, *Secretary*

STATE OF CONNECTICUT,
COUNTY OF HARTFORD, ss.

On this 25th day of February, A. D. 1955, before me personally came W. H. Wallace, to me known, who being by me duly sworn, did depose and say: that he resides in the County of Hartford, State of Connecticut; that he is the Vice-President of the HARTFORD ACCIDENT AND INDEMNITY COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

(s) HERBERT P. SCHOEN
[SEAL] *Notary Public*
My commission expires March 31, 1957

CERTIFICATE

STATE OF CONNECTICUT,
COUNTY OF HARTFORD, ss.

I, the undersigned, Assistant Secretary of the HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Connecticut Corporation, Do HEREBY CERTIFY that the foregoing and attached POWER OF ATTORNEY remains in full force and has not been revoked; and furthermore, that Article IV, Sections 8 and 11, of the By-Laws of the Company, and the Resolution of the Board of Directors, set forth in the Power of Attorney, is now in force.

Signed and sealed at the City of Hartford. Dated the 2nd day of August 1955.

(s) R. MACHINNON
[SEAL] *Assistant Secretary*

PLAINTIFF'S EXHIBIT NO. 26.

[Letterhead, Daniel D'Onfro's Sons]

November 25, 1955

Lizza & Sons, Inc.
2123 Orchard Street
Oyster Bay, New York

Gentlemen:

This company acknowledges receipt of your telegram dated November 24, 1955.

By the terms of said telegram this company assumes that you consider that there exists a binding contract between the parties. We wish to advise you that, under no circumstances, do we feel that a binding contract has ever been executed, due to the fact that you have made substantial alterations to the proposed contract, without our authority.

You were advised by our letter of October 4, 1955, and by personal conversation, that we insisted that the proposed contract remain in its original form, and our position has never changed.

We hereby wish to indicate that we are ready and willing to proceed with the performance of work and labor as provided in the proposed contract in the form in which it was forwarded to you under the following conditions:

1. That the contract be executed in the same form in which you received it, with no deletions.
2. That you will guarantee us an extension beyond September 30, 1956, in the event the work contemplated in such proposed contract has not been completed at that time; which extension will be required because of your failure to execute the proposed contract and your delay in preparing the job site.
3. That in the event we agree to furnish the stone for the sloped paving, the bonus to be paid to you under

the terms of the proposed contract be deleted from said contract.

Very truly yours,
(s) RALPH D. D'ONFRO

DEFENDANT'S EXHIBIT "A".

[Letterhead, Daniel D'Onfro's Sons]

June 2, 1955

Lizza & Sons, Inc.
Oyster Bay, N. Y.

Re: Contract 51-021 Lee & Becket.

Gentlemen:

Congratulations on the letting of yesterday.

The enclosed quotation confirms our telephone conversation of May 28, 1955.

We will furnish performance bond and all other necessary insurance for our portion of the work.

We are ready to move in anytime you are ready.

Very truly yours,
DANIEL D'ONFRO'S SONS
By (s) DANIEL D'ONFRO
DANIEL D'ONFRO

DEFENDANT'S EXHIBIT "B".

[Letterhead, Daniel D'Onfro's Sons]

June 23, 1955

Lizza & Sons, Inc.
Oyster Bay, N. Y.

Re: Contract 51-021
Lee and Becket

Gentlemen:

We have communicated with the concrete plants and the best quotation we have received is from the Berkshire Gravel, Inc., which we herewith enclose.

We are ready to execute the agreement you require in signing our sub-contract.

If you care to go over the items in detail we will be very glad to do so.

Very truly yours,
DANIEL D'ONFRO'S SONS
By (s) DANIEL D'ONFRO
DANIEL D'ONFRO

DEFENDANT'S EXHIBIT "D".

July 27, 1955

Daniel D'Onfro's Sons
712 Main Street
Leominster, Mass.

Re: Mass Turnpike—Lee-Becket—Contract 51-021
Att: Mr. D'Onfro

Gentlemen:

As per our conversation on July 26, 1955 concerning certain revisions to be made in the contract.

Please be advised that certain corrections have been made as per agreement.

Please sign all three copies affix Company Seal and Attest.

Mail all copies to our Oyster Bay Office, Att: Mr. E. Pelzer and he will then mail you one countersigned copy for your records.

Give this your valued attention immediately.

Very truly yours,

JFM/hm
cc: Main Office
File
Encl:

JOSEPH F. MARINO
Projects Mgr.

DEFENDANT'S EXHIBIT "F".

COPY

August 23, 1955

Daniel D'Onfro Sons
712 Main Street
Leominster, Mass.

Re: Contract 51-021—Mass. Tpke—Lee-Becket

Gentlemen:

Would you please present us at your earliest convenience a detailed schedule of operations for your contract work so that we can coordinate your schedule with the overall

progress of other contractors work and the schedule for the entire job.

Please give this your valued attention and consideration and attend to this matter as soon as possible.

Very truly yours,

JFM/hm — JOSEPH F. MARINO

cc: Lee Office — *Projects Mgr.*
Main Office
File

DEFENDANT'S EXHIBIT "G".

COPY

[Letterhead, Daniel D'Onfro's Sons]

August 1, 1955

SCHEDULE OF PROGRESS

LEE & BECKET

Item 1. Beginning culvert at Sta. 122 plus.
" 2. Culvert Sta. 310
" 3. Bridge No. 2 Sta. 313
" 4. Culvert Sta. 244
" 5. Culvert Route 20 Sta. 242
" 6. Bridge No. 1 Sta. 240
" 7&8. Bridge and Retaining Wall Appalachian Trail, Sta. 283

Estimated time for each culvert approximate three weeks, depending on weather.

DANIEL D'ONFRO SONS

DEFENDANT'S EXHIBIT "H".

[Letterhead, Daniel D'Onfro's Sons]

August 26, 1955

Lizza & Sons, Inc.
Oyster Bay, New York. Re: Becket-Lee Contract.

Gentlemen:

Confirming my telephone conversation with you to-day. I have been advised by my attorney that my fathers' signature is not legal therefore the contract must be returned for the proper signatures. You do not have to return the bond.

Kindly attend to this matter immediately so that we can order shipment of our truck crane and build the panels.

Very truly yours,

DANIEL D'ONFRO'S SONS

By (s) RALPH D'ONFRO

RALPH D'ONFRO

DEFENDANT'S EXHIBIT "I".

September 7, 1955

Daniel D'Onfro & Sons
712 Main Street,
Leominster, Mass.
Attention: Mr. D'Onfro
Re: Contract 51-021
Massachusetts Turnpike, Lee-Becket

Gentlemen:

Please return the three (3) unsigned copies of Contracts mailed to you by us. We are in receipt of the three (3) signed copies of the contract delivered to us by hand by Mr. D'Onfro, senior.

Please give this your valued attention immediately.

Very truly yours,

JOSEPH F. MARINO

Projects Mgr.

JFM:rd

PHONE 7-7487

DANIEL D'ONFRO'S SONS

GENERAL CONTRACTORS

712 MAIN STREET
LEOMINSTER, MASS. July 25, 1955

PLAINTIFF'S EXHIBIT NO. 5.
187

Lizza & Sons
Oyster Bay, N. Y.

Gentlemen:

We wish these changes made in the proposed contract you have drawn.

1. Because you are doing all rock excavation, we do not want the Rip Rap or the slope paving.

2. Because there are other items involved in the Class A Trench Excavation we do not want this item.

3. Before our bridge excavation can be done it will be necessary for the Lizza Company to make approaches through swamps or do roadway earth or rock excavation so that our crews can get to the bridge sites.

4. Under item 2 in your contract, we do not assume any liability for delays not caused by us.

5. Under item 6 in your contract; Article 34 in the Standard Specifications state that the Engineer for the Massachusetts Turnpike will furnish the staking of the location for the bridge and box culverts.

6. Under item 8 in your contract; Because in all cases the Lizza Company will necessarily be on the job site first, they should obtain necessary permits, property agreements and releases.

7. Under artical 11 in your contract. We will set the anchor bolts for the structural steel if the Lizza Company allows us $5.00 per set or our cost which ever being least.

Very truly yours,

Daniel D'Onfro's Sons

By Daniel D'Onfro

Daniel D'Onfro

DEFENDANT'S EXHIBIT "C". 221

AGREEMENT made this day of July, 1955, by and between LIZZA & SONS, INC., of 21-23 Orchard St., Oyster Bay, New York, (hereinafter called the Contractor), and DANIEL D'ONFRO'S SONS, located at 712 Main St., Leominster, Massachusetts, (hereinafter called the Subcontractor:)

WHEREAS: This contract is entered into subject to the award by the Massachusetts Turnpike Authority to the Contractor of the General Contract No. 51-021 and is subject to the approval of the qualifications of the Subcontractor by the Massachusetts Turnpike Authority.

WITNESSETH; That the parties hereto in consideration of mutual covenants and promises herein contained hereby contract and agrees as follows:

1. The Subcontractor will furnish all materials and equipment and perform all labor required under Contract No. 51-021 with the Massachusetts Turnpike Authority in accordance with the plans and specifications furnished by the Massachusetts Turnpike Authority. Said work to encompass and include the following specific items as listed on the sheet entitled tabulation of bids June 1st, 1955, furnished by the Massachusetts Turnpike Authority:

	ITEM	AMT	DESCRIPTION	UNIT PRICE
1.	A3-1	800...	Bridge Excavation	$5.00 per c.y
2.	C5-1a.	1020...	Class "A" Cement Concrete Masonry in Footings	25.00 " "
3.	C5-1b	1100...	Class "A" Cement Concrete Masonry in Abutments and Wingwalls above footings.....	48.00 " "
4.	C5-1c	627...	Class "A" Cement Concrete Masonry in Pier Shafts.....	50.00 " "
5.	C5-1d	537...	Class "A" Cement Concrete Masonry in Approach Slabs.....	25.00 " "
6.	C5-1e	2680...	Class "A" Cement Concrete Masonry in Box Culverts, Flumes and Retaining Wall.....	48.00 " "
7.	C5-4a	1360...	Class "D" Cement Concrete Masonry for Bridge Decks.....	6 .00 " "

	ITEM	AMT	DESCRIPTION	UNIT PRICE
8.	C5-7-95	3,600...	Steel Reinforcement for Structures (Placing Only).....	0.025 per lb.
9.	C10-1	2440...	Bituminous Damp Proofing.....	.50 per s.y.
10.	C-17-1	3990...	Rip Rap.....	8.00 per c.y.
11.	C-17-3	3970...	Slope Paving for Bridges.....	4.00 per s.y.
12.	C20-2	1950...	Aluminum Railing on Concrete 1 Rail (1'-4" High).....	6.50 per l.f.
13.	C20-4	384...	Aluminum Railing on Concrete 2 Rails	7.50 per l.f.
14.	C20-5	100...	Aluminum Railing on Concrete 1 Rail (1'-3" High)	6.90 per l.f.
15.	E3-9	16...	Bridge Anchor Assemblies.....	25.00 each

2. All the work done and materials furnished under this contract shall be in accordance with the plans and specifications for said work as furnished by the Massachusetts Turnpike Authority. The Subcontractor has inspected said specifications and plans and agrees that it understands said plans and specifications thoroughly and is agreeable to all the terms and clauses contained therein with no exceptions and accepts the plans and specifications which by reference are made a part hereof so far as they apply to the items listed above. The Subcontractor specifically agrees to conform to the provisions which provides for the progress and time of completion of the project, AND.

3. The Subcontractor will furnish to the Contractor a Surety Company's Performance Bond equal to the full amount of this contract. This Bond shall meet with the approval of the Massachusetts Turnpike Authority. All other forms of necessary insurance in accordance with the requirements of the Massachusetts Turnpike Authority shall be provided for by the Subcontractor.

4. In the event it becomes necessary for the Subcontractor to do any portion of Item A3-2 which is located on Page P3-a of the special provisions of the itemized proposal which relates to Class "A" Trench Excavation in connection with the above aforementioned items, it is hereby further agreed that the Subcontractor will perform this work at an agreed price of

$2.00 per cu. yd. However, before said Subcontractor shall perform any of this work to wit (Class "A" Trench Excavation), the Subcontractor shall obtain from the Contractor, written authorization to perform said work

5. The Subcontractor will completely be responsible for all its work and will make any necessary corrections of its work at its own expense, and it also agrees that all of its work will be done by labor forces that are Union members in good standing and the Subcontractor further agrees that its contracts or agreements necessary in the performance of the work which it is undertaking, will meet with Union requirements prevalent in the area. The Subcontractor further agrees that the work called for hereunder shall be coordinated with the work of the Contractor and such other subcontractors as may be engaged on the over-all project in a manner designed to accomplish the most efficient and economical completion of the entire project; and the Subcontractor further agrees that the work performed by it will be under the general superintendence of the Contractor.

6. The Subcontractor agrees that it will do all its own engineering and layout pertaining to every phase of the items listed above.

7. The Subcontractor has inspected said specifications and plans and agrees that it understands said plans and specifications thoroughly and is agreeable to all the terms and clauses contained therein with no exception and accepts the plans and specifications which by reference are made a part hereof so far as they apply to the items listed above.

8. The Subcontractor will be responsible for obtaining all the necessary permits, property agreements and releases and anything else in connection with the items listed above in order to prosecute its work.

9. The Subcontractor agrees that it is aware of the fact that there may be a delay in the acquisition of right of way and if so agrees to make no claim against the Contractor for said delays or penalties incurred.

10. The Subcontractor agrees that it will maintain and protect all traffic in connection with its work as outlined in the plans and specifications.

11. The Subcontractor agrees that it will set all Anchor Bolts as called for in the plans and specifications. The said Anchor Bolts covering Items C20-2, C20-4, and C20-5 to be furnished by said Subcontractor and the balance to be furnished and delivered to the job site by others.

12. The payments shall be made upon monthly estimates furnished on such work by the said Section Engineer or other persons in authority of the Massachusetts Turnpike Authority less 10% of the work that shall be inspected, approved, and accepted by such section engineer. Said payment shall be made within 10 days after the Contractor receives payment from the Massachusetts Turnpike Authority for said monthly estimate.

13. That the Contractor and the Subcontractor hereby agrees that when the Contractor has completed his entire work for the Massachusetts Turnpike Authority under Contract No. 51-021, and said Massachusetts Turnpike Authority has made final payment to the Contractor including all retention fees, then the Contractor will pay to the Subcontractor the monies withheld as retained percentages on this contract less the sum of $8,000.00 which payment shall be the full and final payment under this agreement.

Ex 1
56-179

DANIEL D'ONFRO'S SONS

GENERAL CONTRACTORS

712 MAIN STREET
LEOMINSTER, MASS.

BRIDGE QUOTATION - LEEand BECKET

CONTRACT 51-021

ITEM		QUANTITY	UNIT PRICE	AMOUNT
A3-1	Bridge Excavation	800 c.y.	$5.00	4,000.00
C5-1a	Class A Concrete Footings	1,020 "	25.00	25,500.00
C5-1b	" " Abutments	1,100 "	48.00	52,800.00
C5-1c	" " Pier Shafts	627 "	50.00	31,350.00
C5-1d	" " Approach Slab	537 "	25.00	13,425.00
C5-1e	" " Box Culverts	2,680 "	48.00	128,640.00
C5-4a	" " Bridge Decks	1,360 "	60.00	81,600.00
C5-4b	" " Headwalls	89 "	60.00	4,390.00
				342,655.00
C5-7	Steel Reinforcing Bars (Placing only)	953,600 lbs	.025	23,840.00
C10-1	Damppreefing	2,440 s.y.	.50	1,220.00
~~C17-1~~	~~Rip Rap~~	~~3,990 c.y.~~	~~8.00~~	~~31,920.00~~
~~C17-3~~	~~Slope Paving~~	~~3,970 "~~	~~4.00~~	~~15,880.00~~
C20-1-2	Railing	1,950 l.f.	6.50	6,555.00
C20-4	Aluminum 2 Rail	184 "	7.50	1,370.00
C20-5	" 1 "	100 "	6.90	690.00
E3-9	Bridge Anchor Assemblies	16	25.00	400.00
			Total	$424,530.00

PLAINTIFF'S EXHIBIT NO. 177

14. (a) That if the Subcontractor, through default on his part, shall fail to complete the work herein prescribed, so as to be finally approved and accepted by the Section Engineer of Massachusetts Turnpike Authority, and if through such failure, the Contractor shall be penalized under his contract with the said duly authorized and constituted officials of the said Massachusetts Turnpike Authority, then, and, in such event, the Subcontractor shall reimburse the Contractor for any sum or sums of money that the Contractor shall rightfully pay to the duly authorized and constituted officials of the Massachusetts Turnpike Authority because of such default of the Subcontractor.

(b) That if the Subcontractor, after starting the work herein contracted for, shall refuse to carry on, then all moneys withheld by the Contractor for him, as hereinbefore provided, shall be forfeited to the Contractor by the Subcontractor as liquidated damages therefor.

(c) That the provisions contained in the two preceding paragraphs of this contract shall not be deemed or construed to deprive the Contractor of his right to elect to sue the Subcontractor for any damages that such breach may cause him.

(d) That if it shall become necessary for the Contractor, by action, to enforce the collection of any sum or sums of moneys under this agreement, the Subcontractor shall pay to the Contractor all necessary expenses, including a reasonable attorney's fee, that the Contractor may incur in the institution, or prosecution, of any such action.

56-179 Dept. Ex. J

(Page 234 - Form)

We have executed this bond

PAUL J. WOODCOME INSURANCE AGENCY, INC.

Hartford Accident and Indemnity Co.

HARTFORD, CONNECTICUT

DEFENDANT'S EXHIBIT "J" 237

APPLICATION FOR CONTRACT OR BID BOND

AGENCY	Agency Code No.	Agency File No.	H. O. Bond No.

NOTE—Copy of Contract, Specifications, Plans, Bond Form required (in case Bid Bond, Advertisement and Instructions to bidders), and Applicant's Financial Statement must accompany this Application and all questions be fully answered.

1. Name of Applicant Daniel A.D'Onfro, Ralph D.D'Onfro, Emanuel D. D'Onfro, Virgil D. D'Onfro and Nicholas A. D'Onfro co-partners dba Daniel D'Onfro's Sons (If corporation, give exact corporate title)
2. Address (Street, City and State) 712 Main St., Leominster, Mass.
3. If a corporation, state when incorporated ..... In what state incorporated .....
4. If a firm, name all partners; if a corporation, name principal officers.

Name	Age	Address

5. **Kinds and amounts of bonds required and premiums to be paid therefor:**

(a) **Proposal Bond** $ ..... Premium $ .....
payable in advance, but if the bond is conditioned for or guarantees the performance of the contract the premium shall be that shown in (b) below. 392,610.

(b) **Contract Bond** $ 392,610. Premium $ .....

Labor and Material Bond $ ..... Premium $ .....

payable in advance for the term of ..... year(s), and an additional premium payable annually thereafter calculated at the rate of $ ..... per $1,000 on the amount of the uncompleted work at the beginning of each annual period, it being understood that an additional premium shall also be payable, at said rates, based on any increase in the contract price, as shown by a certificate of the architect or engineer in charge of the work covered by the contract, to be adjusted upon completion of the contract.

(c) **Labor Bond** $ ..... Premium $ .....

payable in advance, for its term, at the rate of $ ..... per $1,000 on the penalty of bond.

(d) **Maintenance Bond** $ ..... Premium $ .....

payable in advance, for the full maintenance or guarantee period, or any part thereof, at the rate of $ ..... per $1,000 per annum of the total cost of the work covered by the maintenance guarantee.

6. **To whom is bond to be given?** Lizza & Sons, Inc.
21-23 Orchard St., Oyster Bay, New York,
(Give full name and address. If to a corporation, give exact title)

7. If bond applied for is Proposal Bond, will it operate as a final bond? .....
State date bids to be opened ....., 19..... Approximate amount of bid, $ .....
What bids for other contracts have you outstanding, (a) unopened, and (b) opened but unawarded? .....

NOTE—Amount and rate of premium must be inserted before this application is signed; otherwise a new application will be required.

TERMS OF CONTRACT

8. **The Amount of Contract is: $** 300,000. Date awarded 7/26/55
(If contract price is per unit of measure, give also probable total of contract)

9. Nature of Contract (Give concise description of proposed work and locality)
Furnish all materials and equipment and perform all labor required under Contract No.51-021 ---Massachusetts Turnpike Authority Lee Massachusetts

10. Name and address of Architect or Engineer in charge .....
What is his estimate of cost of work? $ ..... Your estimate? $ .....
11. Date work is to be commenced ..... Date work is to be completed .....
12. Penalty for non-completion on time ..... Premium for advance completion .....
13. Is there a strike clause in the contract? ..... An Arbitration provision? .....

Form S-3235 Rev. Printed in U. S. A.

14. Payments, when to be made on contract?

15. Are payments to be made wholly in cash? If not, in what?
If payments are in stocks, bonds, warrants or other securities, advise fully what arrangements made for disposing of same

16. Percentage reserved from payments until completion

17. How long must work be kept in **Repair** after completion?

Is this **Repair or Maintenance** guarantee limited to defects in workmanship or materials?

If not, describe guarantee fully

18. Will construction bond remain in force for the maintenance repair or guarantee period?

If not, will separate bond be required? and in what amount? $

19. What portion of work is guaranteed after completion and value of same?

Percentage of payments retained until expiration of maintenance period?

20 State approximate amount of this contract which will be **Sublet** $, and describe below the principal **Subcontracts:**

Amount	Character of Work	Name of Subcontractor	If Bonded, By What Company?

21. **Other Bidders** on above contract including highest and lowest:

Name	Address	Bid
(1)		
(2)		
(3)		
(4)		
(5)		

22. Give information below about all your **Contract Work Under Way,** or for which you are committed.
(If more than five contracts under way, tabulate them on separate paper and attach hereto.)

	Contract Price	Kind of Construction	Location of Work	Payments Thus Far Received	Earned Retained Percentage	Expected Completion Date	Name and Address Engineer or Architect
(a)							
(b)							
(c)							
(d)							
(e)							

23. Names of surety companies which issued bonds on above (a)

(b) (c)

(d) (e)

24. State amount and character of Insurance you will carry on this contract and name of company issuing each policy. Fire, $ (Amount) ; (Company) ; Compensation, $ (Amount) ; (Company) ;
Employers' Liability, $ (Amount) ; (Company) ; Public Liability, $ (Amount) ; (Company) ;
Contingent Liability, $ (Amount) ; (Company) ; Paymaster Robbery, $ (Amount) ; (Company) ;
Life Insurance, $ (Amount) ; (Company) ; (Beneficiary)

GENERAL

25. Is your present plant sufficient for this contract? Estimated cost to put it in good shape for this work, $ State what new plant will be purchased, advising cost and how you will pay for same. (Use separate sheet if necessary)

26. Have you purchased or made binding contracts for the materials needed for this contract, and within your estimates?

27. How are deliveries assured to you?

28. Have you applied to any other company for this bond? State name of company and reasons why declined

29. Give names of surety companies with which you have previously dealt

30. Are there **Any** mechanics' liens filed on **Any** of your work anywhere?

31. Are there any judgments, suits or claims pending against you?

32. What projects have you completed in your own name?

Contract Amount	Class of Work	When Completed	Name and Address of Owner

NOTE—If the required information is not given in response to the questions hereon listed, it will be necessary to return this blank for completion.

IN WITNESS WHEREOF, LIZZA & SONS, INC., has caused this agreement to be executed by its proper officers and its corporate seal to be hereunto affixed and the DANIEL D'ONFRO'S SONS, has caused this agreement to be executed by its proper officers and its corporate seal to be hereunto affixed the day and year first above written.

LIZZA & SONS, INC.

BY:_____

ATTEST:_____

DANIEL D'ONFRO'S SONS

BY:_____

ATTEST:_____

on October 20, 1955. On that day Mr. Thomas guaranteed to us, in the presence of the state engineer, that we would definitely commence work on Monday, October 24th and as a result of this representation we moved all of our equipment and employees to the job site and were ready, willing and able to commence work on October 24th.

Due to the fact that you had done nothing to prepare the job for us we retained our employees and equipment at the job site until Thursday, October 27th, at which time, due to great expense it was necessary for us to send our employees to their homes, as at that time you had done nothing in furtherance of our contract.

On November 1st we again visited the job site and found that the same previous conditions existed and after visiting the job site on November 9th we found that the same conditions still existed and we were therefore unable to perform this contract.

Due to the long delay and exorbitant expense incurred by us, which delay was not caused by our own failure to perform the terms of the contract we hereby notify you that we consider the contract breached and therefore void. We further notify you that we will not be in a position to do any work for you under the terms thereof.

We do understand, however, that the Dane Construction Company of Somerville, Mass., which company is now constructing bridges on the toll road in Lee, Mass., for the Elmhurst Contracting Co. is interested in negotiating with you for the erection of the structures. This information we pass on to you trusting that it can be of some use.

In the interest of possible future relationship we are willing to waive any claim which we presently have for expenses and damages, providing you submit to us your assent to the terms of this communication.

Very truly yours,

(s) Ralph D. D'Onfro

33. References: Give only E[illegible]neers or Architects, or Owners, for whom [illegible] have done work:

Name	Address	Business

The undersigned hereby represents that the statements, declarations, and answers contained in the foregoing application are true and correct, and are made to induce the Hartford Accident and Indemnity Company, of Hartford, Connecticut, (hereinafter referred to as the "Company"), to execute, or procure the execution of, the bond, or bonds, herein applied for, as surety, or cosurety, and hereby agrees with, and binds himself and his heirs, executors, administrators, successors and assigns to, the Company, as follows:

First: To pay the Company, in advance, the premium, or premiums, including all additional premiums, if any, applicable to the bond, or bonds, herein applied for, (which bond, or bonds, are, or may be, attached hereto as a part hereof), in the amount, or amounts, and at the rate, or rates, set forth, for the term, or terms, fixed, and as provided, in 5 (a), (b), (c), and (d) of the foregoing application. The undersigned expressly authorizes the Company to fill in any blank spaces left unfilled in the foregoing application, and, particularly, but without limiting the generality of the foregoing, in 5 (a), (b), (c), or (d), and in 8 and 9 thereof, and to describe properly, or to correct any errors in the description of, said bond, or bonds, or of the contract, or contracts, to secure the performance of which said bond, or bonds, are required, or to which said bond, or bonds, refer or relate, or in the amount, or amounts, or rate, or rates, of premium, or premiums, agreed to be paid the Company for said bond, or bonds, or the term, or terms, thereof, and it is agreed that any such insertions or corrections, when so made, shall be prima facie correct. Any such change made by the Company shall be deemed to have been made according to the requirements of Paragraph Sixteenth hereinafter set forth.

Second: To indemnify the Company, and hold it harmless, from and against any and all demands, loss, costs, damage and expense of every nature and kind, including attorneys fees, and any and all liability therefor, which the Company, at any time, or for any cause, shall, or may incur, sustain, be put to or threatened with, by reason, or in consequence, of the execution, or the procurement of the execution, of said bond, or bonds, or which it may sustain, incur, or be put to, in connection with any litigation investigation, collection of premiums, or other matters connected with said bond, or bonds, or the execution, or procurement of the execution thereof, including, but without limiting the generality of the foregoing, the enforcement of the covenants and obligations of this agreement; to pay to the Company, or secure the Company in respect of, all sums, or amounts, of money for which it may become liable, as aforesaid, as soon as the Company may become liable therefor, and whether or not it shall have paid out any such sums, or any part thereof, and it is expressly agreed that the Company, in its discretion and without prejudice to any and all other rights it may have, may enforce this covenant by an action for specific performance or exoneration; to pay, reimburse, and make good, to the Company all sums, or amounts, of money which it may pay, or cause to be paid, as aforesaid.

Third: In further consideration of the execution, or the procurement of the execution, of said bond, or bonds, as surety, or co-surety, the undersigned does hereby assign, transfer, and set over to the Company as collateral, to secure the covenants and obligations herein assumed, and any and all other indebtedness and liabilities of the undersigned to the Company up to the sum of One Million Dollars ($1,000,000), whether heretofore or hereafter incurred, such assignment to become effective as of the date hereof, but only upon the happening of any one, or more, of the events set out and enumerated in (a), (b), (c), (d), (e), (f), (g), and (h) hereof, (1) all the right, title and interest of the undersigned in and to all subcontracts let, or to be let, in connection with the contract, or contracts, to secure the performance of which said bond, or bonds, are executed, or to which said bond, or bonds, in any respect refer or relate (which contract, or contracts, are, or may be, attached hereto as a part hereof), and in and to all machinery, equipment, plant, tools and materials which are now, or hereafter may be, upon or about the site of the work contemplated by said contract, or contracts, or elsewhere for the purpose thereof, including, but without limiting the generality of the foregoing, materials purchased for, or chargeable to, such contract, or contracts, which may be in process of construction or fabrication, in storage elsewhere, or in transportation to said site, and the undersigned authorizes and empowers the Company, and its authorized representatives, to enter upon the site of said contract, or contracts, or elsewhere, and take possession of all, or any portion of, said machinery, equipment, plant, tools and materials, and to enjoy possession thereof, and to use, or permit the use of, move, remove, or sell, the same as owner thereof, without incurring any liability of any nature or kind to the undersigned, or any person, firm or corporation claiming through the undersigned; in connection therewith, except as provided in Paragraph Sixth hereof; and (2) all actions, causes of action, claims and demands, whatsoever, which the undersigned may have, or acquire, against any subcontractor, laborer, or material man, or any person furnishing, or agreeing to furnish, or supply labor, material, supplies, machinery, tools or equipment in connection with, or on account of, said contract, or contracts, and against any surety of such subcontractor, laborer, or furnisher of labor, material, supplies, machinery, tools or equipment. This assignment shall be effective as of the date hereof in the event of (a) any abandonment, forfeiture, or breach of, or failure, refusal, or inability to perform, the terms and provisions of said contract, or contracts, or of any [illegible] to perform the terms and provisions of any other contract, or contracts,

Ninth: The undersigned expressly waives all rights to claim any property, including homestead, as exempt from levy, execution, sale, or any other legal process under the law, or laws, of any state and the benefit of any and all appraisement and stay laws now in force or hereafter to be passed.

Tenth: All the terms, covenants, and agreements hereof shall be, and are, for the benefit of any person, or company, joining with the Company in executing said bond, or bonds, or any of them, or executing said bond, or bonds, or any of them, at the request of the Company, as well as of any company, or companies, assuming reinsurance on said bond, or bonds, or any of them.

Eleventh: The undersigned hereby authorizes any attorney of any court of record in the United States to appear and confess judgment against him in favor of the Company, or its successors or assigns, for any amount or amounts due the Company at any time or times hereunder, together with interest, costs of collection and attorney fees equal to ten per cent. (10%) of the amount so due, for which this shall be a sufficient warrant. The undersigned hereby releases all errors and defects whatsoever in entering any such judgment, or in any proceeding thereon, and hereby agrees that no writ of error, appeal, petition to open or strike off any such judgment shall be taken or prosecuted by the undersigned. The undersigned waives the right of inquisition on any real estate that may be levied upon and further waives the benefit of any and all appraisement, stay or exemption laws of any state, now in force or hereafter to be passed. The undersigned further agrees that the foregoing warrant shall not be exhausted by one exercise thereof and expressly authorizes the confession of successive judgments against him for any amounts which may become due hereunder. Any such judgment or judgments may be confessed upon a copy of this contract, verified by affidavit, and it shall not be necessary to file the original as a warrant of attorney, any law or rule of court to the contrary notwithstanding. If the provisions of this paragraph pertaining to confession of judgment, or if confession of judgment in respect of causes of action such as may arise hereunder, is prohibited, or is not permitted, by the law governing and fixing the rights and liabilities of the parties hereto, the provisions of this Paragraph Eleventh shall be wholly inapplicable and of no effect, and this agreement shall be construed as if this paragraph were not included herein.

Twelfth: Separate suits may be brought hereunder as causes of action accrue, and the bringing of suit, or the recovery of judgment upon any cause of action, shall not prejudice or bar the bringing of other suits upon other causes of action, whether theretofore or thereafter arising.

Thirteenth: Nothing herein contained shall be considered, or construed, to waive, abridge, or diminish any right or remedy which the Company might have if this instrument were not executed, or under any other instruments or agreements, and the rights of the Company hereunder shall be deemed to be cumulative with, and in addition to, all other rights of the Company, however derived.

Fourteenth: The Company shall have the right to decline to execute said bond, or bonds, or any of them, and if it shall execute a proposal or bid bond for the undersigned hereunder, the Company shall have the right to decline to execute any and all other bonds herein applied for. or required to be furnished by the undersigned in satisfaction of the conditions of said bid or proposal bond, without incurring any liability of any nature or kind to the undersigned by reason of such declination.

Fifteenth: Notwithstanding the fact that the word "undersigned" is used herein in the singular number and masculine gender, it and the context hereof shall be construed to apply to the party or parties signatory hereto, regardless of number or gender, and the liability of the undersigned shall be the joint and several liabilities of the signatory parties and the remedies of the Company shall also be joint and several.

Sixteenth: That no act or omission of the Surety in modifying, amending, limiting or extending the bond or undertaking shall in any wise affect the liability of the undersigned.

Seventeenth: This instrument may not be changed or modified orally. No change or modification shall be effective unless made by written endorsement issued to form a part hereof.

SIGNED, SEALED AND DATED this 26th day of July 19 55

IF INDIVIDUAL sign here:

Witness: Daniel A. D'Onfro, Ralph D. D'Onfro, Manuedl D. Virgil D. D'Onfro and Nicholas A. D'Onfro co-partne dba Daniel D'Onfro's Sons (Seal)

Witness:

IF COPARTNERSHIP sign here:

(Seal)

(Seal)
(Individually and as a copartner)

(Seal)
(Individually and as a copartner)

(Seal)
(Individually and as a copartner)

IF CORPORATION sign here:

DEFENDANT'S EXHIBIT "K".

[Letterhead, Lizza & Sons, Inc.]

November 12, 1955

Lizza & Sons, Inc.
21-23 Orchard Street,
Oyster Bay, New York
Attention: Mr. Elia E. Lizza
Re: Contract 51-021, Massachusetts Turnpike, Lee-Becket

Gentlemen:

In accordance with our telephone conversation of this date relative to the status of the structure work to be done by our sub-contractor, I have prepared the following report. I have made every effort to present the facts in their chronological order.

Between my arrival in Lee, Mass. and the early part of October 1955, Messrs. Ralph and Daniel D'Onfro appeared on the job on several occasions. Each time they arrived they would inquire as to the status of their contract with Lizza & Sons and if we had received any word from the Authority as to its approval of them as our sub-contractor: I believe that on one occasion you were present when they were here. Each time they were assured by this office that they would be informed of any and all progress on matters pertaining to their operations.

Excavation for the box culvert at approximately Station 121 was basically completed by Elmhurst Construction Company for Estimate #2 which closed on September 27, 1955. At that time it was deemed inadvisable to do any fine grading because of the questionable delivery dates for the required reinforcing steel for this culvert. During this period it was decided that we could divert the existing stream to the west of the proposed culvert location. It was felt that if the area of the footer were to be fine graded at that time, prior to the delivery of the reinforcing steel, we would

lose this fine grading should a severe rainstorm occur. This fear was justified as we did have two severe storms during the first part of October 1955.

Mr. Daniel D'Onfro appeared on the job during the week of October 3rd and stated that he was not satisfied with the proposed method of diversion for the stream. We considered his contentions and felt that while his method had merit our method would prove equally satisfactory and less costly. When the steel for culvert C-1 arrived on October 10, 1955, we notified D'Onfro of this fact and ordered him onto the job. This was done after conversations with Mr. Joseph Marino. On October 20, 1955, Messrs. Ralph and Daniel D'Onfro arrived on the job and informed us that they would not proceed until such time as the existing stream was diverted to their satisfaction. After discussions among Mr. Joseph Marino, Mr. Peter Ferrara and the writer, we decided to divert the water in accordance with D'Onfro's wishes and argue about who should pay for it later. Elmhurst Construction Company was notified that they should proceed immediately with their fine grading of the footer area. D'Onfro's were assured, in the presence of Mr. R. Downie of Brown & Blauvelt, that their operations could begin no later than the morning of October 24, 1955.

The existing stream was diverted and fine grading operations were started. As this fine grading operation proceeded, it became apparent that the actual foundation conditions encountered were not as anticipated. On October 27, 1955 we were informed by the Section Engineers that a study would have to be made by them before we could complete our work on the footer. On October 28th, Elmhurst dug three test pits in the footer area, on orders from the Section Engineers, and found that the eastern half of the foundation was unsatisfactory. On November 1, 1955 the writer was orally informed by Mr. Joseph Malloy of Brown & Blauvelt that their study indicated the necessity

of spreading the footer one foot on each side, thus changing the overall width from 30 to 32 feet. On November 3rd we received a letter from the engineers directing this change.

We, of course, notified Elmhurst of this change and they in turn brought in men and equipment on November 8, 1955 and began the necessary work.

On November 9, 1955 our Mr. Ralph Hackett received a phone call from Mr. Sacco of the Dane Construction Company inquiring as to the possibility of their doing some of our structure work. This information was, I believe, passed on to our Oyster Bay Office. Mr. Sacco had been contacted previously by D'Onfro's. Ralph D'Onfro was in our office on this date also and inquired as to whether we had heard from Dane. When informed that we had he left immediately.

On November 11, 1955 during the A.M., Ralph Hackett called Daniel D'Onfro and requested that he come to Lee to make a personal inspection of the fine graded footer area. Mr. D'Onfro refused, stating that until such time as he had received a reply to his recent letter to Oyster Bay he would not come to Lee.

It might be pointed out that when D'Onfro departed on October 27th the steel for Culvert C-6 was on the site.

Very truly yours,

(s) ROBERT H. THOMAS

ROBERT H. THOMAS

Project Engineer

RHT:rad

cc: J. Marino

DEFENDANT'S EXHIBIT "O".

OYSTER BAY NY 18 PB NOV 14 1212PHE

DABUEK D'ONFRO'S SONS

712 MAIN ST LEOMINSTER MASS

ACKNOWLEDGE RECEIPT YOUR LETTER DATED NOV 9 1955 WE WILL TAKE ALL NECESSARY STEPS TO PROTECT OUR INTEREST

LIZZA AND SONS INC.

DEFENDANT'S EXHIBIT "P".

[Letterhead, Lizza & Sons, Inc.]

November 14, 1955

Hartford Accident & Indemnity Co.
Hartford, Connecticut
Attention: Mr. Walter Downs

Re: Bond Hartford Accident & Indemnity Co. and Daniel A. D'Onfro et als d/b/a Daniel D'Onfro's Sons to Lizza & Sons, Inc. Contract No. 51-021 Massachusetts Turnpike Authority

Gentlemen:

I am herewith enclosing photostatic copy of letter which was delivered by D'Onfro's Sons to our office on November 10, 1955.

It appears from this letter that D'Onfro does not intend to perform the work required in accordance with agreement entered into with our company. There is no merit to their contention.

As time is of the essence, will you please advise us immediately if you wish to have us proceed with the work under this contract; if so, we will maintain separate records pertaining to this portion of work and will expect to be reimbursed by your company for any losses we may sustain; or would you prefer said work done by a contractor of your own choice?

Very truly yours,
By: (s) MAX GERBER
MAX GERBER

md/MG
Enc.

Copy to:
Daniel D'Onfro's Sons
712 Main Street
Leominster, Massachusetts
Hartford Accident & Indemnity Co.
70 Pine Street
New York, New York Attention: Mr. Beardsley

DEFENDANT'S EXHIBIT "Q".

[Western Union Telegram]

BC008 SPG279 SSQ572

B FTA231 (SY GLA120) PD=OYSTER BAY NY 23 453PME=

DANIEL D'ONFRO'S SONS=

LEOMINSTER MASS=(RTE DIR FOR AM)=

IN ACCORDANCE WITH OUR PREVIOUS NOTICE WE ARE GOING TO PROCEED TO DO THE WORK YOU CONTRACTED FOR, AND REFUSED TO DO & WE WILL HOLD YOU RESPONSIBLE FOR ANY LOSS=

LIZZA AND SONS=

(930 AM NOV 24 55)=

COURT EXHIBIT AA

[Letterhead, Anthony F. Aloia, M. D.]

Nov. 12, 1956

To Whom It May Concern

This is to certify that Mr. Daniel D'Onfro is recuperating from a recent cerebral vascular accident (shock) and is at present on a regime of limited activity.

It is my professional opinion that it would be detrimental to the health of the patient at the present time to subject him to the excitement and tension attendant upon an appearance in a court as a witness.

Very truly yours,

(s) ANTHONY F. ALOIA

ANTHONY F. ALOIA, M. D.

are, or may be, attached hereto as a part hereof; and in and to ... hereafter may be, upon or about the site of the work contemplated by said contract, or contracts, or elsewhere for the purpose thereof, including, but without limiting the generality of the foregoing, materials purchased for, or chargeable to, such contract, or contracts, which may be in process of construction or fabrication, in storage elsewhere, or in transportation to said site, and the undersigned authorizes and empowers the Company, and its authorized representatives, to enter upon the site of said contract, or contracts, or elsewhere, and take possession of all, or any portion of, said machinery, equipment, plant, tools and materials, and to enjoy possession thereof, and to use, or permit the use of, move, remove, or sell, the same as owner thereof, without incurring any liability of any nature or kind to the undersigned, or any person, firm or corporation claiming through the undersigned; in connection therewith, except as provided in Paragraph Sixth hereof; and (2) all actions, causes of action, claims and demands, whatsoever, which the undersigned may have, or acquire, against any subcontractor, laborer, or material man, or any person furnishing, or agreeing to furnish, or supply labor, material, supplies, machinery, tools or equipment in connection with, or on account of, said contract, or contracts, and against any surety of such subcontractor, laborer, or furnisher of labor, material, supplies, machinery, tools or equipment. This assignment shall be effective as of the date hereof in the event of (a) any abandonment, forfeiture, or breach of, or failure, refusal, or inability to perform, the terms and provisions of said contract, or contracts, or of any abandonment, forfeiture, or breach of, or failure, refusal, or inability to perform, the terms and provisions of any other contract, or contracts, to secure the performance of which any other bond, or bonds, were heretofore, or are hereafter executed by the Company, or to which any such other bond, or bonds, in any respect refer or relate (which contract, or contracts, and bond, or bonds, are, or may be, attached hereto as a part hereof); or (b) of the failure to perform, or comply with, any of the covenants and obligations hereof; or (c) of the failure to pay and discharge, when due, such other indebtedness or liabilities of the undersigned to the Company; or (d) of any assignment by the undersigned for the benefit of creditors, or of the appointment, or of any application for the appointment, of a receiver or trustee for the undersigned, whether insolvent or not; or (e) of any proceeding, legal or otherwise, which deprives, or has the effect of depriving, the undersigned of the use, or interferes with the use by the undersigned, of any of the machinery, equipment, plant, tools or material heretofore referred to; or (f) if the undersigned be an individual, of the abscondence of the undersigned, or conviction of the undersigned of a felony, or should the undersigned become a fugitive from justice, or (g) of the failure, delay, refusal or inability of the undersigned to pay bills or any indebtedness incurred in, or in connection with, the performance of said contract, or contracts, or incurred in, or in connection with, the performance of any other contract, or contracts, to secure the performance of which any other bond, or bonds, were heretofore, or are hereafter executed by the Company, or to which any such other bond, or bonds, in any respect refer or relate, as aforesaid, whether or not the Company may be liable for such bills, or any of them, or such indebtedness, or any such indebtedness, or (h) of the failure, refusal, or inability of the undersigned to satisfy the condition, or any of the conditions, of said bond, or bonds.

Fourth: In further consideration of the execution, or the procurement of the execution, of said bond, or bonds, as surety or co-surety, the undersigned, as of this date, hereby assigns, transfers and sets over to the Company, and also subrogates the Company to, all right and property of the undersigned in, and growing in any manner out of, said contract, or contracts (generally described in 8 and 9 of the foregoing application and which are, or may be, attached hereto as a part hereof as aforesaid) or any extensions, modifications, changes or alterations thereof, or additions thereto, and all rights and property of the undersigned in and to all monies, securities, warrants, checks, or other evidences of indebtedness, including but without limiting the generality of the foregoing, deferred and reserved payments, current and earned estimates, and final payments, that may be due and payable to the undersigned thereunder, or for extra work or materials furnished in connection therewith, at the time of the happening or occurrence of any one or more of the events enumerated in clauses (a), (b), (c), (d), (e), (f), (g), or (h) of the Third paragraph hereof, or that thereafter may become due to the undersigned. The undersigned hereby authorizes and empowers the Company, and to this end the Company is hereby irrevocably constituted and appointed the attorney-in-fact of the undersigned in its own name, or in the name of the undersigned, to receive, sue for, or otherwise collect, and receipt and give acquittance for, all such monies, securities, warrants, checks or other evidences of indebtedness, and if necessary, or required, to endorse the name of the undersigned on any such securities, warrants, checks or other evidences of indebtedness, and to hold the same as security to protect it from and against any and all liability, loss, costs, damage and expense of every nature or kind, including attorneys fees, which the Company may sustain or incur, or which may be imposed, or sought to be imposed, upon it under, or by reason of, said bond, or bonds, or under, or by reason of any other bond, or bonds, heretofore, or hereafter executed by the Company on behalf of the undersigned, or on his indemnity, and for the payment of any and all other indebtedness and liability of the undersigned to the Company up to the sum of One Million Dollars ($1,000,000), with the right, which right is hereby expressly given and granted to the Company, to cash, discount, or sell all, or any part of such securities, warrants, checks or other evidences of indebtedness, and to use all such monies, including the proceeds of such securities, warrants, checks or other evidences of indebtedness to discharge such liability and pay, or reimburse itself for, such loss, costs, damage and expense, including attorneys fees, and such other indebtedness or liability.

Fifth: The undersigned further agrees that the entire contract price, or prices, of said contract, or contracts, is, and shall be, dedicated to the satisfaction of the conditions of said bond, or bonds, and that all money paid or securities, warrants, checks or other evidences of indebtedness, including the proceeds thereof, given upon, or under, said contract, or contracts, shall be impressed with a trust in the hands of the undersigned, and his heirs, administrators, executors, successors or assigns, in favor of the Company for the purpose of satisfying the conditions of said bond, or bonds, and the undersigned agrees to use all such money, securities, warrants, checks, or other evidences of indebtedness, including the proceeds thereof, for that purpose, and for no other purpose, until the conditions of said bond, or bonds, have been fully satisfied.

Sixth: The undersigned further agrees that the Company, in its discretion, may sell any property assigned to the Company, as aforesaid, or heretofore or hereafter deposited with the Company for any purpose, or which may be in the possession of the Company, at public or private sale, and with or without notice of the time or place of such sale, and may use the proceeds thereof for all, or any, of the purposes hereinbefore provided. When liability of the Company under said bond, or bonds, terminates, or has been discharged, any balance of money, securities, warrants, checks or other evidences of indebtedness, or other property of the undersigned remaining in the hands of the Company after the Company shall have paid, or reimbursed itself for, all liability, loss, costs, damage and expense, including attorneys fees, and any other indebtedness or liability of the undersigned to the Company, as aforesaid, shall be returned to the undersigned, or to the party legally entitled to receive and receipt for the same.

Seventh: Liability of the undersigned hereunder shall extend to, and include, the full amount of any and all sums paid by the Company in settlement or compromise of any claims, demands, suits and judgments upon said bond, or bonds, or any of them, in good faith, under the belief that it was liable therefor, whether or not such liability existed, as well as to any and all disbursements on account of costs, expenses and attorneys fees, as aforesaid; which may be made in good faith under the belief that such were necessary, whether necessary or not.

Witness: [illegible]

Nicholas A McCrea

[illegible] (Seal)

(Individually and as a copartner)

[illegible] (Seal)

(Individually and as a copartner)

[illegible] (Seal)

(Individually and as a copartner)

IF CORPORATION sign here:

.....
(Name of corporation)

Attest: ..... By .....

Secretary President

ACKNOWLEDGE SIGNATURES ON THIS PAGE

Individual Acknowledgment

STATE OF .....
} ss.:
COUNTY OF .....

On the ..... day of ..... 19....., before me personally appeared ..... to me known and known to me to be the person described in and who executed the foregoing instrument, and he ..... thereupon ..... acknowledged to me that he executed the same.

Firm Acknowledgment

STATE OF .....
} ss.:
COUNTY OF .....

On this ..... day of ..... 19....., before me personally appeared ..... to me known and known to me to be one of the firm of ..... described in and who executed the foregoing instrument, and he ..... thereupon ..... acknowledged to me that he executed the same as and for the act and deed of said firm.

Corporation Acknowledgment

STATE OF .....
} ss.:
COUNTY OF .....

On the ..... day of ..... 19....., before me personally came ..... to me known, who being by me duly sworn, did depose and say: that he resides in ..... that he is the President of the ..... the corporation described in and which executed the above instrument, that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of di[illegible]ors of said corporation, and that he signed

OPINION.
January 2, 1957

ALDRICH, D.J.

This is a petition for a declaratory judgment brought by the Hartford Accident and Indemnity Company, hereinafter called Hartford, a Connecticut corporation. The respondents are Lizza & Sons, Inc., hereinafter called Lizza, a New York corporation, and D'Onfro's Sons, a Massachusetts partnership, composed of Daniel D'Onfro, hereinafter called D'Onfro, Sr., and his four sons. Lizza is the general contractor for a portion of a highway and appurtenances in the town of Lee, Massachusetts, made with the Metropolitan Turnpike Authority, hereinafter called the Authority. Hartford seeks to establish that it is not liable on a construction bond given to secure the performance by D'Onfro's Sons of an alleged sub-contract with Lizza. It asserts that its bond was invalid because not executed by D'Onfro's Sons, and that there was no sub-contract for it to secure in any event.

The bond, in the face amount of $392,000, was executed by Hartford as surety on August 2, 1955, though dated July 26. Prior to that time D'Onfro's Sons had signed an application for a bond in the amount of $300,000, containing the usual indemnity agreement. That bond, and another for $320,000, had been cancelled after issuance on their request as too small. The application was amended to the larger amount. The final bond as executed by Hartford bore the typewritten signatures of the individual D'Onfros as principals. When given to them by Hartford they were told to sign it in ink before delivery to Lizza, but they delivered it without doing so. Hartford asserts that if the principal is not liable on the bond, the surety cannot be. Whether this doctrine depends upon the failure of an implied right of indemnity, or the mere absence of a right in the obligee to sue the principal, I hold it inap-

plicable to this case. Hartford had a separate indemnity agreement. More important, a signature may be typewritten, *Irving* v. *The Goodimate Co.*, 320 Mass. 454, and I believe by delivery of the bond the D'Onfros so adopted the typewriting. Alternatively, I would hold that Hartford, after releasing the bond with typewritten signatures, could not be heard to say they were insufficient.

The existence of the sub-contract is a different matter. Shortly prior to June 1, 1955 Lizza informed D'Onfro's Sons that it was going to bid on the general contract, and was shooting for the job, by which it meant it was making as close a bid as possible, and invited sub-bids on certain projects, with prices as low as D'Onfro's Sons could manage. D'Onfro's Sons furnished figures and Lizza submitted its general bid to the Authority, which was promptly accepted. The above circumstances admittedly did not create any contractual obligation between Lizza and D'Onfro's Sons. About the middle of June a preliminary conference was had between the parties in Worcester. It was attended by the president, Lizza, Sr., and by Merino and Cavello, Lizza's project manager and chief engineer. Representing D'Onfro's Sons were D'Onfro, Sr. and Ralph D'Onfro, one of the sons, hereinafter called D'Onfro, Jr. Cavello is now dead, and D'Onfro, Sr. was unable to come to court because of illness. The others were witnesses. D'Onfro, Jr. testified that at this meeting Lizza, Sr. stated that he had been awarded the contract, and that he was willing to employ D'Onfro's Sons as sub-contractors, but that they must shave something off their original bid, because he had used their figures, with no allowance for his own overhead, and that D'Onfro, Jr. replied that their sub-bid had been as low as they could figure it, and it could not be cut. He testified that this conversation went no further. Lizza, Sr., and Merino, both testified that it was affirmatively agreed at this meeting that D'Onfro's Sons

would receive the subcontract, and would allow a $8,000 reduction over their original bid.

I do not know whether $8,000 was mentioned or not on this day—it may have been to D'Onfro, Sr., who may have indicated some receptivity, but I find that because of D'Onfro, Jr.'s attitude no understanding was reached. This finding seems confirmed by the fact that Lizza did nothing further with relation to this sub-contract until July 13, when D'Onfro, Sr. and D'Onfro, Jr. visited the Lizza office in New York. Lizza argues they would not have made the trip if they had not already understood they were to get the contract, but I think the inference is the other way. Immediately following this meeting Lizza set out to draft the agreement. If all that was needed was a nudge, a telephone call should have sufficed. Instead, I find that at this conference D'Onfro, Sr., for himself, accepted the idea of an $8,000 reduction, and that D'Onfro, Jr. took him home while he, D'Onfro, Jr., gave the matter some more thought. I believe Lizza concluded the father would persuade him, and set out to draft an agreement.

On July 19 Lizza mailed its draft, providing for the $8,000 cut. D'Onfro, Sr. convinced D'Onfro, Jr. that this cut was inevitable, and D'Onfro, Jr. gave in, but only provided a saving could be worked out elsewhere. Apparently rip rap and slope paving were expensive, non-profit items. The D'Onfros prepared a letter, dated July 25, which suggested the elimination of these items, and a number of other changes in Lizza's draft. By its silence on that subject this letter accepted the $8,000 over-all reduction, but, by implication, only if the new conditions were ageed to.

D'Onfro, Sr. took this letter to New York on July 26 and had a conference with Merino. The parties made notes upon it, and upon a copy of the draft. I find that their minds met, and that the second draft, which Merino prepared and forwarded the next day, conformed with what

they had agreed to. But I find further that Merino understood that D'Onfro's Sons was a partnership, and that D'Onfro, Sr. would have to get the assent of the others—notably D'Onfro, Jr. The reason for this was that Merino had persuaded D'Onfro, Sr. to put the rip rap and slope paving back into the agreement by promising him that Lizza would supply the stone therefor, which it would have in abundance because of necessary excavating. However, Merino would not place this obligation in the agreement, because it was not firm. He was willing to give the stone only if D'Onfro's Sons were ready to receive it at the time Lizza was trucking it away. D'Onfro, Sr. was personally satisfied with this informal arrangement, but, when he returned home he found D'Onfro, Jr. was not. Accordingly the D'Onfros redrew the agreement with a specific obligation upon Lizza to supply the stone, and sent it back. For some reason D'Onfro, Sr. alone signed this draft for the partnership. A subordinate of Lizza returned it for the sons to sign before it was "processed for final execution." In view of the known inability of D'Onfro, Sr. to carry the rest of his firm, this was a very reasonable precaution. However, when the rest of the D'Onfros had signed the draft, Lizza refused to.

On the basis of these findings the ultimate decision is clear. I find that no completed agreement was reached on July 26, because Merino understood that D'Onfro, Sr. did not have the requisite authority from his sons, and was not purporting to commit the partnership. This is borne out by the fact that at no time thereafter, although there were many opportunities, did Merino charge D'Onfro's Sons with breaking an agreement they had made July 26th. Instead, he kept trying to hold them to their bid, although it was Lizza who had changed the bid price.

Lizza asks why did the D'Onfros obtain the bond unless they thought an agreement had been reached on July 26th?

There are two possible answers to this. The first is that the bond was delivered no earlier than with the third draft of the agreement prepared by them. It is not to be taken as simultaneous confirmation of a different agreement. This suggests a second line of thought. Although I incline to believe otherwise, it may be that when Merino wrote at the bottom of D'Onfro's letter of July 25 "Rip Rap Dump at Locations" he promised this as a firm committment in the written contract; that he then left it out, and the D'Onfros thought they had successfully restored it by their draft. Such a finding would not help Lizza, because in that event it committed a substantial breach of its July 26 understanding, and persisted in it. However, I rather think the bond was just a come-on, to induce Lizza to sign the third draft and close the situation.

For some time thereafter the parties believed that they were going to reach agreement, and acted accordingly, but if they ever did so it was not the agreement of July 26, and is without the bond. On the pleadings I do not regard as before me a possible meeting of minds in September or October, to which the bond would not apply, and I have considered subsequent events only to the extent that they cast light on what took place before.*

In view of this finding it is not necessary to determine whether a bond securing a "written contract of 26 July" can support a completed oral agreement, intended by the parties to be put into a written memorial, but in fact never executed. It seems to me that a surety should have the

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* For example, a study of D'Onfro, Jr.'s letter of November 9 does not convince me that he was stating that both parties had finally executed an agreement. However, even if he did, it would not change my views heretofore expressed. There are a certain amount of inconsistencies and inadequacies on both sides, and would be, no matter what findings were made. In view of the fact that the parties were not lawyers, and these transactions took place over an extended period, this is understandable.

right to require that the agreement it secures be written, available, and undisputable, and so condition its obligation. Furthermore, on the contentions of the parties here, it would seem that the alleged contract, were I to find it, was broken even before the bond was delivered, and hence, under familiar principles, uninsurable. However, the parties have not argued these points, and it is unnecessary to consider them. A judgment of complainant's non-liability will be entered.

(s) ALDRICH,
U. S. D. J.

FINAL JUDGMENT.
January 2, 1957.

ALDRICH, D.J.

Upon the opinion of even date it is hereby adjudged as follows:

1. The respondents Lizza & Sons, Inc. and D'Onfro's Sons did not, at any time prior to the delivery to Lizza of complainant Hartford Accident & Indemnity Company's bond dated July 26, 1955, enter into any contract or agreement with each other, and complainant is under no liability to either respondent on account of said bond.

2. Complainant shall have its costs against respondent Lizza & Sons, Inc. taxed in the amount of $

By the Court,

(s) FRANCES R. FOLEY
Deputy Clerk

(s) ALDRICH
U. S. D. J.

and (2) all actions, causes of action, claims and demands, whatsoever, which the undersigned may have or acquire against any subcontractor, laborer, or material man, or any person furnishing, or agreeing to furnish, or supply labor, material, supplies, machinery, tools or equipment in connection with, or on account of, said contract, or contracts, and against any surety of such subcontractor, laborer, or furnisher of labor, material, supplies, machinery, tools or equipment. This assignment shall be effective as of the date hereof in the event of (a) any abandonment, forfeiture, or breach of, or failure, refusal, or inability to perform, the terms and provisions of said contract, or contracts, or of any abandonment, forfeiture, or breach of, or failure, refusal, or inability to perform, the terms and provisions of any other contract, or contracts, to secure the performance of which any other bond, or bonds, were heretofore, or are hereafter executed by the Company, or to which any such other bond, or bonds, in any respect refer or relate (which contract, or contracts, and bond, or bonds, are, or may be, attached hereto as a part hereof); or (b) of the failure to perform, or comply with, any of the covenants and obligations hereof; or (c) of the failure to pay and discharge, when due, such other indebtedness or liabilities of the undersigned to the Company; or (d) of any assignment by the undersigned for the benefit of creditors, or of the appointment, or of any application for the appointment, of a receiver or trustee for the undersigned, whether insolvent or not; or (e) of any proceeding, legal or otherwise, which deprives, or has the effect of depriving, the undersigned of the use, or interferes with the use by the undersigned, of any of the machinery, equipment, plant, tools or material heretofore referred to; or (f) if the undersigned be an individual, of the abscondence of the undersigned, or conviction of the undersigned of a felony, or should the undersigned become a fugitive from justice, or (g) of the failure, delay, refusal or inability of the undersigned to pay bills or any indebtedness incurred in, or in connection with, the performance of said contract, or contracts, or incurred in, or in connection with, the performance of any other contract, or contracts, to secure the performance of which any other bond, or bonds, were heretofore, or are hereafter executed by the Company, or to which any such other bond, or bonds, in any respect refer or relate, as aforesaid, whether or not the Company may be liable for such bills, or any of them, or such indebtedness, or any such indebtedness, or (h) of the failure, refusal, or inability of the undersigned to satisfy the condition, or any of the conditions, of said bond, or bonds.

Fourth: In further consideration of the execution, or the procurement of the execution, of said bond, or bonds, as surety or co-surety, the undersigned, as of this date, hereby assigns, transfers and sets over to the Company, and also subrogates the Company to, all right and property of the undersigned in, and growing in any manner out of, said contract, or contracts (generally described in 8 and 9 of the foregoing application and which are, or may be, attached hereto as a part hereof as aforesaid) or any extensions, modifications, changes or alterations thereof, or additions thereto, and all rights and property of the undersigned in and to all monies, securities, warrants, checks, or other evidences of indebtedness, including but without limiting the generality of the foregoing, deferred and reserved payments, current and earned estimates, and final payments, that may be due and payable to the undersigned thereunder, or for extra work or materials furnished in connection therewith at the time of the happening or occurrence of any one or more of the events enumerated in clauses (a), (b), (c), (d), (e), (f), (g), or (h) of the Third paragraph hereof, or that thereafter may become due to the undersigned. The undersigned hereby authorizes and empowers the Company, and to this end the Company is hereby irrevocably constituted and appointed the attorney-in-fact of the undersigned in its own name, or in the name of the undersigned, to receive, sue for, or otherwise collect, and receipt and give acquittance for, all such monies, securities, warrants, checks or other evidences of indebtedness, and if necessary, or required, to endorse the name of the undersigned on any such securities, warrants, checks or other evidences of indebtedness, and to hold the same as security to protect it from and against any and all liability, loss, costs, damage and expense of every nature or kind, including attorneys fees, which the Company may sustain or incur, or which may be imposed, or sought to be imposed, upon it under, or by reason of, said bond, or bonds, or under, or by reason of any other bond, or bonds, heretofore, or hereafter executed by the Company on behalf of the undersigned, or on his indemnity, and for the payment of any and all other indebtedness and liability of the undersigned to the Company up to the sum of One Million Dollars ($1,000,000), with the right, which right is hereby expressly given and granted to the Company, to cash, discount, or sell all, or any part of such securities, warrants, checks or other evidences of indebtedness, and to use all such monies, including the proceeds of such securities, warrants, checks or other evidences of indebtedness to discharge such liability and pay, or reimburse itself for, such loss, costs, damage and expense, including attorneys fees, and such other indebtedness or liability.

Fifth: The undersigned further agrees that the entire contract price, or prices, of said contract, or contracts, is, and shall be, dedicated to the satisfaction of the conditions of said bond, or bonds, and that all money paid or securities, warrants, checks or other evidences of indebtedness, including the proceeds thereof, given upon, or under, said contract, or contracts, shall be impressed with a trust in the hands of the undersigned, and his heirs, administrators, executors, successors or assigns, in favor of the Company for the purpose of satisfying the conditions of said bond, or bonds, and the undersigned agrees to use all such money, securities, warrants, checks, or other evidences of indebtedness, including the proceeds thereof, for that purpose, and for no other purpose, until the conditions of said bond, or bonds, have been fully satisfied.

Sixth: The undersigned further agrees that the Company, in its discretion, may sell any property assigned to the Company, as aforesaid, or heretofore or hereafter deposited with the Company for any purpose, or which may be in the possession of the Company, at public or private sale, and with or without notice of the time or place of such sale, and may use the proceeds thereof for all, or any, of the purposes hereinbefore provided. When liability of the Company under said bond, or bonds, terminates, or has been discharged, any balance of money, securities, warrants, checks or other evidences of indebtedness, or other property of the undersigned remaining in the hands of the Company after the Company shall have paid, or reimbursed itself for, all liability, loss, costs, damage and expense, including attorneys fees, and any other indebtedness or liability of the undersigned to the Company, as aforesaid, shall be returned to the undersigned, or to the party legally entitled to receive and receipt for the same.

Seventh: Liability of the undersigned hereunder shall extend to, and include, the full amount of any and all sums paid by the Company in settlement or compromise of any claims, demands, suits and judgments upon said bond, or bonds, or any of them, in good faith, under the belief that it was liable therefor, whether or not such liability existed, as well as to any and all disbursements on account of costs, expenses and attorneys fees, as aforesaid, which may be made in good faith under the belief that such were necessary, whether necessary or not.

Eighth: In the event of the payment, settlement or compromise, in good faith, of liability, loss, costs, damage, expense, or attorneys fees, claims, demands, suits or judgments, as aforesaid, an itemized statement thereof, sworn to by any officer of the Company, or the voucher, or vouchers showing, or any evidence of, such payment, or compromise, shall be prima facie evidence of the fact, and extent, of the liability of the undersigned in respect of any claim or suit hereunder, and in any and all matters and things arising between the undersigned and the Company.

.....(Seal)
(Individually and as a copartner)

.....(Seal)
(Individually and as a copartner)

IF CORPORATION sign here:

.....
(Name of corporation)

Attest: ..... By .....
Secretary President

ACKNOWLEDGE SIGNATURES ON THIS PAGE

Individual Acknowledgment

STATE OF .....
COUNTY OF ..... } *ss.:*

On the ..... day of ..... 19....., before me personally appeared ..... to me known and known to me to be the person described in and who executed the foregoing instrument, and he ..... thereupon acknowledged to me that he executed the same.

.....

Firm Acknowledgment

STATE OF .....
COUNTY OF ..... } *ss.:*

On this ..... day of ..... 19....., before me personally appeared ..... to me known and known to me to be one of the firm of ..... described in and who executed the foregoing instrument, and he ..... thereupon acknowledged to me that he executed the same as and for the act and deed of said firm.

.....

Corporation Acknowledgment

STATE OF .....
COUNTY OF ..... } *ss.:*

On the ..... day of ..... 19....., before me personally came ..... to me known, who being by me duly sworn, did depose and say: that he resides in ..... that he is the President of the .....
the corporation described in and which executed the above instrument, that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

.....

NOTICE OF APPEAL.

Notice is hereby given that Lizza and Sons, Inc., defendants in the above action, hereby appeal to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on January 2, 1957.

(s) John L. Saltonstall, Jr.
(s) Frank E. A. Sander
Hill, Barlow, Goodale & Adams
Attorneys for Appellant
53 State Street
Boston, Massachusetts

In the United States Court of Appeals
for the First Circuit.

No. 5227

Lizza and Sons, Inc.,
Appellant
v.
Hartford Accident and Indemnity Co.,
Appellee.

MOTION TO OMIT EXHIBITS E, L, AND M FROM PRINTINIG.

In view of the fact that Exhibits E, L, and M are large charts which would be difficult and expensive to reproduce in the appendix to appellant's brief, appellant hereby moves that these exhibits need not be so reproduced, but may be referred to by Court and counsel as if they were.

It is believed that these exhibits are in any event not directly material to the issues here on appeal, but since one of the appellant's contentions will be that there is insufficient evidence in the record to sustain one of the

District Court's findings, this motion is made so that the Court will have the entire record before it.

By its attorneys,

(s) FRANK E. A. SANDER
HILL, BARLOW, GOODALE & ADAMS
FRANK E. A. SANDER
53 State Street
Boston, Mass.

ORDER OF COURT

March 18, 1957.

Upon motion of appellant, It is ordered that Exhibits E, L and M may be omitted from reproduction in the record appendix to brief for appellant and the Court and counsel may refer to such exhibits in their original form as if reproduced in said record appendix.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

SUPPLEMENTAL RECORD APPENDIX.

PLAINTIFF'S EXHIBIT NO. 24.[*]

[Letterhead, Daniel D'Onfro's Sons]

November 9, 1955

Lizza & Sons, Inc.
Oyster Bay, New York

Re: Contract No. 51-021—Lee & Becket
Massachusetts Turnpike Authority.

Gentlemen:

Since July 27, 1955, the date that the contract was executed between you and this company, Daniel D'Onfro's Sons, we have been ready and willing to commence performance of that agreement relative to the construction of bridges and culverts on the job in Lee, Massachusetts. This we have been prevented from doing, through no fault of our own, and for reasons unknown to us, but obviously known to you.

According to a work schedule submitted to us by you indicating that you had prepared the job site for construction by us we were to have commenced work on October 15th. On that date, namely October 15, 1955, we appeared at the job site and observed that nothing had been done by you by way of preparation in order that we could properly commence our work.

On October 19th we again visited the job site and found that nothing had been done in order that we could properly proceed in performance of our contract and on that day, we made an appointment with the district engineer of the toll road and your employee, Mr. Thomas, for a conference

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[* Due to an error, several paragraphs of Exhibit 24 (R. 211) were ommitted from the separately bound record appendix. The entire exhibit is therefore reprinted here. On the other hand, inadvertently all of Exhibit 26 (R. 218) was printed, although only the first three paragraphs had been admitted in evidence. (R. 174-75.)]

Note

Page 50 of the "Supplemental Record Appendix" appears in the guard hole frame of card 4.